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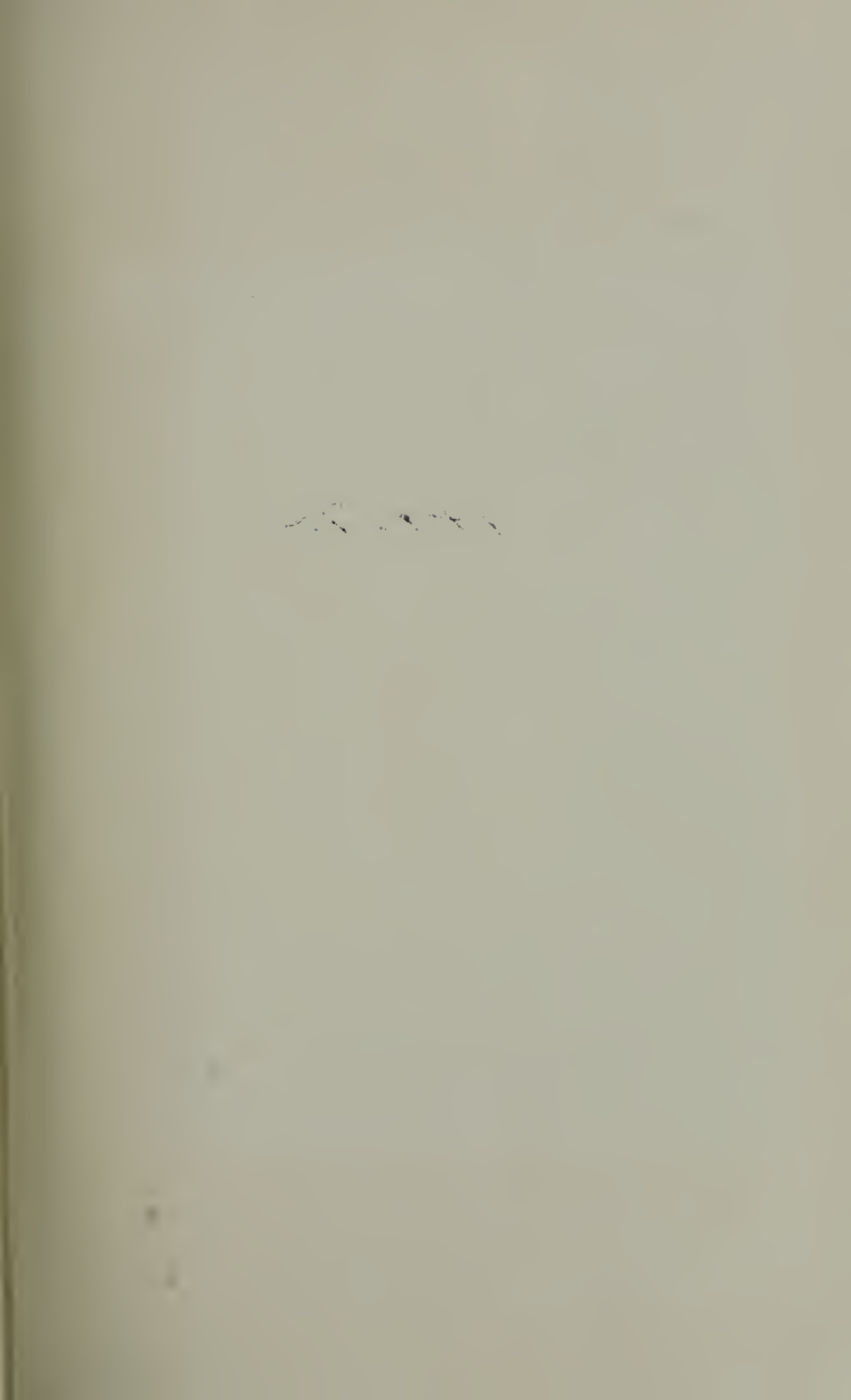
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2581

12238

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.
ELMER R. JOHNSON,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court
for the Northern District of California
Southern Division.

AUG 15 1948

PAUL P. O'BRIEN,
CLERK

12238

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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1212 Broadway,
Oakland, California.

Attorneys for Plaintiff and Appellee.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 27594-H

ELMER R. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR DAMAGES

Plaintiff complains of defendant and for cause
of action alleges:

I.

That this action is brought under and by virtue
of the terms and provisions of Chapter 20, Sub-
chapter 2, U. S. C. A., commonly known as the
Federal Tort Claims Act.

II.

That at all times herein mentioned defendant,
the United States of America was maintaining
through its Department of the Navy a certain
naval base located on the island of Guam, a
territorial possession of the United States.

III.

That on or about the 22nd day of December,
1946, at or about the hour of 5:30 o'clock P. M.
thereof plaintiff was employed by the United

States as a civilian employee of the Navy Department; that plaintiff was residing on defendant's said naval base in certain barracks provided by defendant for the convenience of plaintiff and other civilian employees; that defendant maintained for plaintiff and other civilian employees a certain eating place some three miles distant from said barracks; that said eating place was the only eating place available to plaintiff where he could take his meals; that defendant, acting by and through one of its employees, to wit, a certain chief pharmacist's mate acting in the line of his regular duties as an employee of the Navy Department was transporting plaintiff and certain naval personnel from said eating place back to the said barracks in a certain PC converted naval ambulance; that said vehicle was maintained and owned by defendant; that said vehicle was being operated by said naval employee with the permission and authority of defendant and in the course and scope of the regular duties assigned by defendant to said naval employee; that at said time and place defendant acting by and through its said agent and employee so carelessly and negligently operated and controlled the said vehicle on said road leading from said eating place to said barracks so as to cause the said vehicle to turn over; that as a direct and proximate result of said carelessness and negligence plaintiff was caused to sustain the injuries hereinafter enumerated.

IV.

That by reason of the facts hereinabove set forth, and as a direct proximate result thereof, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following personal injuries, to wit: compound fracture to right tibia and fibula, fracture of the bones of the right shoulder; severe cerebral concussion and contusion to the brain with resultant damage to hearing, extreme pain and suffering and a severe shock to his nervous system.

V.

That at the time of the happening of the accident, plaintiff was a strong and able bodied man capable of earning and earning the sum of approximately Seven Hundred (\$700.00) Dollars per month; that as a direct and proximate result of said carelessness and negligence and the injuries proximately caused plaintiff thereby, plaintiff is now, and will be for an indefinite period of time in the future rendered incapable of performing his usual work or services or any work or services whatsoever, all to plaintiff's damage in an amount as yet unascertainable, and that when said sum is ascertained, plaintiff will pray leave of court to insert said sum as the reasonable value of said loss of services.

VI.

That by reason of the facts hereinabove set forth and as a direct and proximate result thereof as

aforesaid, plaintiff has been generally damaged in the sum of \$90,000.00.

Wherefore, plaintiff prays judgment against defendant in the sum of \$90,000.00, together with his special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

/s/ SHERIDAN DOWNEY, JR.,
Attorney for Plaintiff.

State of California,
County of Alameda—ss.

Sheridan Downey, Jr., being first duly sworn, deposes and says: that he is the attorney for plaintiff in the above entitled action; that he has read the foregoing complaint for damages and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated upon information or belief, and as to those matters that he believes it to be true; that plaintiff is absent from the County of Alameda, wherein affiant maintains his offices and that affiant therefore makes this verification on behalf of plaintiff.

/s/ SHERIDAN DOWNEY, JR.

Subscribed and sworn to before me this 5th day of September, 1947.

[Seal] DORIS ANDERSON,

Notary Public in and for the County of
Alameda, State of California.

[Endorsed]: Filed Sept. 10, 1947.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT
FOR DAMAGES

Plaintiff complains of defendant and for cause of action alleges:

I.

That this action is brought under and by virtue of the provisions of Chapter 20, Subchapter 2, U.S.C.A., commonly known as the Federal Tort Claims Act.

II.

That plaintiff is a citizen and resident of the County of Contra Costa, State of California.

III.

That at all times herein mentioned defendant, the United States of America was maintaining through its Department of the Navy a certain naval base located on the island of Guam, a territorial possession of the United States.

IV.

That on or about the 22nd day of December, 1946, at or about the hour of 5:30 o'clock P.M. thereof, plaintiff was employed by the United States as a civilian employee of the Navy Department; that plaintiff was residing on defendant's said naval base in certain barracks provided by defendant for the convenience of plaintiff and other civilian employees; that defendant maintained for plaintiff and other civilian employees a certain

eating place some three miles distant from said barracks; that said eating place was the only eating place available to plaintiff where he could take his meals; that defendant, acting by and through one of its employees, to wit, a certain chief pharmacists mate acting in the line of his regular duties as an employee of the Navy Department was transporting plaintiff and certain naval personnel from said eating place back to the said barracks in a certain PC converted naval ambulance; that said vehicle was maintained and owned by defendant; that said vehicle was being operated by said naval employee with the permission and authority of defendant and in the course and scope of the regular duties assigned by defendant to said naval employee; that at said time and place defendant acting by and through its said agent and employee so carelessly and negligently operated and controlled the said vehicle on said road leading from said eating place to said barracks so as to cause the said vehicle to turn over; that as a direct and proximate result of said carelessness and negligence plaintiff was caused to sustain the injuries hereinafter enumerated.

V.

That by reason of the facts hereinabove set forth, and as a direct and proximate result thereof, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following personal injuries, to wit: compound fracture to right tibia and fibula, fracture

of the bones of the right shoulder; severe cerebral concussion and contusion to the brain with resultant damage to hearing, extreme pain and suffering and a severe shock to his nervous system.

VI.

That at the time of the happening of the accident, plaintiff was a strong and able bodied man capable of earning and earning the sum of approximately \$700.00 per month; that as a direct and proximate result of said carelessness and negligence and the injuries proximately caused plaintiff thereby, plaintiff is now, and will be for an indefinite period of time in the future rendered incapable of performing his usual work or services or any work or services whatsoever, all to plaintiff's damage in an amount as yet unascertainable, and that when said sum is ascertained, plaintiff will pray leave of court to insert said sum as the reasonable value of said loss of services.

VII.

That by reason of the facts hereinabove set forth and as a direct and proximate result thereof as aforesaid, plaintiff has been generally damaged in the sum of \$90,000.00.

Wherefore, plaintiff prays judgment against defendant in the sum of \$90,000.00, together with his special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

/s/ SHERIDAN DOWNEY, JR.,
Attorney for Plaintiff.

State of California,
County of Alameda—ss.

Sheridan Downey, Jr., being first duly sworn, deposes and says: that he is the attorney for plaintiff in the above entitled action; that he has read the foregoing complaint for damages and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated upon information or belief, and as to those matters that he believes it to be true; that plaintiff is absent from the County of Alameda, wherein affiant maintains his offices and that affiant therefore makes this verification on behalf of plaintiff.

/s/ SHERIDAN DOWNEY, JR.

Subscribed and sworn to before me this 28th day of October, 1947.

[Seal] DORIS ANDERSON,
Notary Public in and for the County of
Alameda, State of California.

[Endorsed]: Filed Oct. 29, 1947.

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED
COMPLAINT

Comes now defendant United States of America, and answering plaintiff's First Amended Complaint on file herein, denies and alleges as follows:

I.

Denies the allegations contained in Paragraphs V, VII, the portion of IV beginning with the words "that defendant," Line 11, page 2, to and including the word "enumerated." Line 27, page 2, and the portion of Paragraph VI, beginning with the word "that," Line 8, page 3, to and including the word "services," Line 16, page 3; and denies that plaintiff has been damaged in the sum of \$90,000.00, or any part thereof, or in any sum or amount or at all.

II.

Alleges that it is without sufficient information to enable it to form a belief as to the truth of the allegations contained in the portion of Paragraph VI beginning with the word "That", Line 6, page 3, to and including the word "month;", Line 8, page 3, and, therefore, and basing its denial upon said ground, denies said allegations.

III.

Further answering said Complaint and as a separate defense thereto, said answering defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by an unavoidable accident.

IV.

Further answering said Complaint and as a separate defense of contributory negligence there-

to, said answering defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by plaintiff's own carelessness and negligence proximately contributing thereto; and alleges that said plaintiff failed to use his eyes and other faculties, failed to use ordinary care and caution to protect himself from injury upon the occasion referred to in the Complaint, and carelessly and negligently rode and continued to ride in the automobile referred to in the Complaint while the same was being operated in a careless and negligent and reckless manner, with the knowledge and consent of said plaintiff, thereby proximately contributing to the cause of the accident and injuries and damages complained of, if any there were.

V.

Further answering said Complaint and as a separate defense thereto, said answering defendant alleges that at the time and place referred to in the Complaint the plaintiff herein and one John F. Moore were engaged upon a joint venture in the operation of the automobile referred to in the Amended Complaint and that the said automobile was upon the occasion referred to in the Amended Complaint being jointly operated by said John F. Moore and the plaintiff herein; that by reason of said joint venture and the said joint operation of said automobile the carelessness or negligence of said John F. Moore in driving and operating said automobile, if any there were, is

imputed to the plaintiff herein by law, and, therefore, the injuries and damages sustained by him, if any, were due to and caused by his own carelessness and negligence in the operation of said automobile.

Wherefore, said defendant prays that plaintiff take nothing by his First Amended Complaint herein, and that said defendant be hence dismissed with its costs.

/s/ FRANK J. HENNESSY,
Attorney,

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney,

Attorneys for Defendant
United States of America

[Endorsed]: Filed April 15, 1948.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS

To the Plaintiff above named, and to Messrs. Hildebrand, Bills & McLeod, and Sheridan Downey, Jr., his Attorneys:

Under the provisions of Rule 36 of the Federal Rules of Civil Procedure as Amended, the above named defendant requests the plaintiff to make written admissions of the truth of the statements

facts set forth below, within eleven (11) days after the service of this request upon plaintiff's attorneys of record.

The statements of fact, the truth of which plaintiff is requested to admit are as follows:

Statement No. 1

On December 22, 1946 one John F. Moore was an enlisted man, to-wit, a Chief Pharmacist's Mate in the United [14] States Navy, and was stationed on the Island of Guam, attached to Fifth Service Depot, on duty at Eighth Ammunition Company.

Statement No. 2

On the afternoon of December 22, 1946 John F. Moore was required by his duties to proceed to the Dispensary at the Fifth Service Depot to turn in his daily report. Before doing so he met the plaintiff, Elmer R. Johnson, and asked plaintiff if he would like to come with him. He told the plaintiff that he would take plaintiff to plaintiff's quarters at the Navy Air Base, Agana, and the plaintiff agreed to accompany Mr. Moore.

Statement No. 3

After the conversation referred to in Statement No. 2 plaintiff Elmer R. Johnson and John F. Moore went into the Club rooms at the Ground Ammunition Depot where they met Seaman 1st Cl. Raymond J. Beaulieu, Seaman 1st Cl. Homer L. Taylor, and Seaman 2nd Cl. William L. Barger. All engaged in conversation and several of the group consumed some beer.

Statement No. 4

During the conversation referred to in Statement No. 3, mention was made of the fact that plaintiff was a barber and the sailors asked plaintiff if he would cut their hair. Plaintiff said that he would if they would come to his quarters at the Naval Air Base.

Statement No. 5

Plaintiff and the seamen asked John F. Moore if he would take them to plaintiff's quarters so that plaintiff might cut the seamen's hair. Mr. Moore agreed to do so.

Statement No. 6

Thereafter, on said December 22, 1946, plaintiff John F. Moore and the three seamen referred to in Statement No. 3 proceeded in a reconverted ambulance belonging to the United States, with Moore driving the same, from the Ground Ammunition Depot to plaintiff's quarters at the Naval Air Base, where they alighted from the vehicle and plaintiff took the seamen to his quarters and cut their hair. Thereafter they all ate dinner.

Statement No. 7

After eating dinner at the Naval Air Base, the seamen asked John F. Moore to take them back to their quarters at the Ground Ammunition Depot, which he agreed to do.

Statement No. 8

While enroute to the Ground Ammunition Depot, Seaman 1st Cl. Homer L. Taylor asked John F.

Moore to drive to the Island Command Brig in order that Taylor might collect some money from one of the sentries at the Brig. Moore then drove the vehicle, in which plaintiff and the three seamen were riding, to the Brig for this purpose.

Statement No. 9

After stopping at the Island Command Brig, Moore and the others proceeded on their way to the Ground Ammunition Depot. Enroute the vehicle in which they were riding overturned.

Statement No. 10

At the time the vehicle overturned, John F. Moore had not yet turned in his daily report at the Fifth Service Depot Dispensary.

Dated: This 26th day of May, 1948.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney.

Attorneys for defendant,
United States of America.

[Endorsed]: Filed May 26, 1948.

[Title of District Court and Cause.]

ANSWER TO REQUEST FOR ADMISSION
OF FACTS

To the defendant's request for admission of facts,
plaintiff makes the following answer:

Statement No. 1: Admits the facts.

Statement No. 2: Admits the facts.

Statement No. 3: Admits the facts.

Statement No. 4: Denies the facts.

Statement No. 5: Denies the facts.

Statement No. 6: Denies the facts.

Statement No. 7: Admits the facts.

Statement No. 8: Admits the facts.

Statement No. 9: Admits the facts.

Statement No. 10: Admits the facts.

Attorney for Plaintiff.

State of California

County of Alameda—ss.

Sheridan Downey, Jr. being first duly sworn deposes and says: That he is the attorney for plaintiff in the above entitled action; that he has read the foregoing Answer to Request for Admission of Facts and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated upon information or belief, and as to those matters that he believes it to be true; that plaintiff is absent from the county of Alameda wherein affiant maintains his offices and that affiant

therefore makes this verification on behalf of plaintiff.

/s/ SHERIDAN DOWNEY, JR.

Subscribed and sworn to before me this 16th day of June, 1948.

[Seal] /s/ DORIS ANDERSON,
Notary Public in and for the County of Alameda,
State of California.

State of California,
County of Alameda—ss.

Zilpha Lambert, being first duly sworn, deposes and says: That she is employed by Hildebrand, Bills & McLeod attorney for plaintiff in the foregoing action; that her business address is 1212 Broadway, Oakland, Alameda County, California; that she is a citizen of the United States over the age of eighteen and a resident of the County of Alameda, the county wherein the mailing referred to herein occurred; that she is not a party to the cause and that on June 17th, 1948 she enclosed a true copy of Answer to Request For Admission of Facts in a secure envelope addressed as follows:

FRANK J. HENNESSY,
United States Attorney,
422 Post Office Building,
San Francisco 1, California.

that she securely sealed the same and deposited it, postage fully prepaid, in the United States Post

Office at Oakland, California; that there is regular daily communication by mail between Oakland, California, and San Francisco, California.

/s/ ZILPHA LAMBERT

Subscribed and sworn to before me this 17th day of June, 1948.

[Seal] /s/ DORIS ANDERSON,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed June 18, 1948.

[Title of District Court and Cause.]

MEMORANDUM OF FACTS AND LAW RE-
LATING TO PRETRIAL CONFERENCE

The Law of Guam

We have been unable to locate any reports of decisions of the Guam Courts and it appears that the law itself is contained entirely in the Codes of Guam which were promulgated and made effective in the year 1947 just prior to the accident to plaintiff.

The applicable provisions of this Code are as follows:

1. Under the heading Civil Code, page 1 it is stated in section 5 that "The provisions of this Code, so far as they are substantially the same as existing law, must be construed as continuations thereof, and not as new enactments."

2. At page 118 of the Civil Code, Section 1714, it is stated:

“Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief.”

3. At page 156, Section 2330 it is stated:

“An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account accrue to the principal.”

4. At page 156, Section 2338 it is stated:

“Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.”

5. At page 225, Section 3281, it is stated:

“Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.”

6. At page 228, Section 3333, it is stated:

“For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.”

7. In the Code of Civil Regulations at page 56, Section 10, Subsection (d), paragraph 1, it states:

“(d) Reckless driving and speed. —(1) Every person driving any vehicle or animal upon any highway shall drive in a careful manner and with due regard for the safety and convenience of pedestrians and all traffic upon such highway.”

Also in paragraph 2 it states:

“(2) Every person driving a motor vehicle on any highway shall run it at a rate of speed at no time greater than is reasonable and proper under all circumstances, having regard to traffic and the use of the way and the safety of the public.”

Also in paragraph 4 it states:

“(4) The lawful speed of trucks of more than 11½ ton capacity is 15 miles on open roads; 10 miles over wooden-decked bridges, and 10 miles in towns where other traffic speed is 15 miles.”

A close search of the entire Code reveals that Guam has not enacted any “Guest” law which would in any way bar plaintiff from a recovery in this action. It is reasonable to conclude, therefore, that as to the involved questions of whether the petty officer was acting in the line of duty we

should consult the Federal Authorities which have previously considered the responsibility of a principal or master for the acts of his servant or employee. Obviously these decisions have necessarily been based upon the laws of the various states and as such they constitute the Federal Common Law unless the law of the particular state contains some special statutory provision regulating the liability of principal for the acts of agent.

The Law Relating to Liability of Principal
For Acts of His Agents

A survey of the opinions of the Federal Courts of this land would seem to establish that while a master is not responsible for the negligent acts of his servant, where the servant is not acting for the benefit of the master or within the scope of his employment, still these decisions make it very clear that a mere incidental detour from the general work of the master is not sufficient to relieve him of responsibility. Likewise the opinions universally established that the fact that the servant commits a negligent act during the course of disobedience to his master's orders, does not necessarily relieve the master of responsibility.

In the case of *Thomas v. Slavens*, 78 Fed. 2d, 144, the Eighth Circuit Court of Appeals considered a case in which a pedestrian was struck by a truck. The sole question was whether the servant driving the truck was acting within the scope of his employment sufficiently so as to attach a liability to the master. The court stated:

“The act of the servant, done to effect some independent purpose of his own, wholly disconnected with his employment, temporarily suspends the relation of master and servant, and the master is not liable for his acts during such time; but to relieve the master from liability of his servant’s acts, on the ground that he has deviated from the scope of his employment, the deviation must be so substantial as to constitute an entire departure from such employment for purposes entirely personal to the servant; and, where the servant notwithstanding the deviation, is still to some extent engaged in the master’s business within the scope of his employment, it is immaterial that he may also have combined with this some private purposes of his own.

“Whether there has been a deviation from the scope of the servant’s employment so material or substantial as to constitute a departure therefrom is usually a question of fact to be decided by the jury. Of course, the deviation might be so marked or so slight as to warrant the court to concluding as a matter of law that the act was or was not a departure; but, where the deviation is uncertain in extent and degree, or where the surrounding facts and circumstances leave room for legitimate inferences as to whether or not, notwithstanding the deviation, the servant may still be engaged in the master’s business within the scope of his general employment, then the question is a jury one, and each case must be determined with a view to its surrounding facts and circumstances.”

In the case of *Babcock v. Tam*, 156 Fed 2d, 116, the Ninth Circuit Court of Appeals rendered a decision which was concerned in part with the question of a master's responsibility for the act of his servant committed at a time when the servant was transporting a guest entirely without authorization from his master. The court stated:

“Under the rules of agency, it is said that a master is liable for the acts of his agent while he is acting within the scope of his employment and that a mere incidental detour from his regular business in such employment will not reduce that liability for accidents which may occur during such a detour. See *R. J. Reynolds Tobacco Co. v. Newby*, 9 Cir. 1944, 145 F. 2d 768; *Edwards v. Earnes*, 1922, 208 Ala. 539, 94 So. 598; *Waack v. Maxwell Hardware Co.*, 1930, 210 Cal. 636, 292 P. 966; Rest. Agency §§ 229 (i), 234. By way of analogy we agree that Tam was not acting as agent for the community, but rather that he was acting in the course of his separate business in appreciation for aid already rendered. Any mere detour which he may have made was properly found to be insufficient to take him outside the scope of his separate business.”

In the case of *U. S. Corp. vs. Petterson Corp.*, 142 Fed. 2d, 197, the Second Circuit Court of Appeals considered a case in which a master was held responsible for a fire caused by the negligent disposal of a cigarette by the master's employee. The court said:

“What the ‘scope of employment’ of such workmen as the stevedores really is has long been a vexed question. In spite of a conflict in the authorities we think that the better reasoned decisions hold the master liable for acts of his servant, whether in excess of authority or contrary to instructions, where the acts are performed in the course of his employment and the master knows or should know that such acts are likely to be performed and that damage to others is likely to happen as a result. Liability was imposed on employers for damage caused by employees through smoking under circumstances where there was likelihood of resulting damage in *Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corp.*, 10 Cir. 49 F. 2d 146; *Wood v. Suanders*, 228 App. Div. 69, 238 N.Y.S. 571; *Jefferson v. Derbyshire Farmers Ltd.* (1921) 2 K.B. 281, and *Palmer v. Keene Forestry Association*, 80 N.H. 68, 112 A. 798, 13 A.L.R. 995. See *Restatement Torts*, § 317; also compare *Adams v. Southern Bell Telephone & Telegraph Co.*, 4 Cir., 295 F. 586.

“It is plain that workmen like the stevedores here are likely to smoke unless restrained and that cigarette smoking and the dropping of cigarette ashes in scrap fallen from a pile of cork loaded on a barge were likely to set fire to the cargo and damage the barge. The conclusion reached by the District Court was founded on inferences reasonably derived from the evidence and seems fully justified.”

In the case of *Schweinhaut v. Flaherty*, 49 Fed. 2d, 533, the Court of Appeals of the District of Columbia considered a case in which a third party was injured by a taxicab while the driver of the cab was engaged in transporting a friend without charge. In this case a judgment for plaintiff was affirmed. The decision is a rather lengthy one and establishes that even though the errand upon which the taxicab was bound at the time of the accident was totally unauthorized and in violation of the master's orders that, nevertheless, the third party was entitled to recover. The Court emphasizes that the master, by providing the servant with a vehicle is responsible for the accident and he actually creates the liability notwithstanding the fact that such liability would not have occurred except for the servant's disobedience to his master's rules. It is also pointed out that the master should be held to very strict responsibility in cases involving motor vehicles because of the fact that such vehicles are potentially dangerous instrumentalities.

The Court distinguishes the use of an automobile by a servant on behalf of a master where such use is an isolated occurrence from the situation where a servant's regular duties include the operation of a motor vehicle.

The Facts

Plaintiff sincerely believes that the facts will show that the operator of the Navy vehicle in question was a regular operator of such vehicle;

that his duties generally required him to travel over almost all of the Naval reservation on Guam; that he frequently had given rides to Naval and civilian employees for reasons not strictly within the scope of his employment; that the master was well aware of this habit and that the master not only permitted this to be done by this particular petty officer but generally permitted it when done by operators of almost all of the Naval vehicles on Guam; that at the time of the accident in question the petty officer had not as yet turned in his daily report and that regardless of any incidental errands, the general course of his vehicle was directed to the fulfillment of that duty; that during the course of the trip which plaintiff took with the petty officer the vehicle upon more than one occasion passed through regular Naval guards or sentries and that no criticism of the carriage of plaintiff was made by such guards or sentries; that plaintiff's sleeping barracks were separated by considerable distance from the place provided by defendant for plaintiff to eat his meals; that it was an incidental obligation of defendant's to transport plaintiff from the one place to the other; that the sole reason for plaintiff getting into the vehicle was for the purpose of going from his sleeping quarters to the restaurant; that while this trip was ordinarily made in a truck provided by the Navy, it was common practice for the Navy to transport civilian employees in any vehicle available.

Conclusion

It appears that the facts are fairly well in agreement and that it remains for the Court to decide simply whether the agent of the government was acting in the course of his duties at the time of the accident sufficiently to impose liability upon the government. We believe that such agency was present and that plaintiff should be awarded reasonable compensation for his very serious injuries.

Respectfully submitted,

/s/ SHERIDAN DOWNEY, JR.

Attorney for Plaintiff.

[Endorsed]: Filed Nov. 6, 1948.

[Title of District Court and Cause.]

TRIAL MEMORANDUM

In response to the Court's request for written argument in the above case, plaintiff desires to call the court's attention to the following facts:

Facts

It seems perfectly clear from the testimony of plaintiff that at the time of the accident in question the vehicle was en route to the Fifth Service Dispensary so that a regular Navy medical report could be turned in. All the evidence points to the fact that the only deviation from the regular course followed was that the vehicle had stopped for a few

minutes at the Island Command Brig to permit a message to be delivered by another sailor. The vehicle was proceeding from the regular eating place of the driver of the vehicle following a regular meal eaten by the driver of the vehicle.

The earlier movements of the vehicle seemed remote so far as being any cause of the accident.

While plaintiff has admitted the various statements of fact submitted by the Government except in one or two particulars, plaintiff wishes to call the Court's attention to the fact that such statements are very brief in character and do not give any coherent continuous picture of the activities followed by the Government employee on that afternoon.

The Law

Plaintiff relies on the earlier memorandum of authorities submitted to this Court with the additional citation of *Campbell v. United States*, 75 Fed. Supp. 181. After an exhaustive research of the authorities, this is the only decision yet printed which bears in any way on the meaning of "acting in line of duty" yet handed down by the Federal Courts of this country.

This was a decision by a District Court in the State of Louisiana holding that an unknown sailor who ran into an elderly woman on a station platform while hurrying to catch his train was acting in the line of duty sufficiently to make the Government liable under the Act.

It would seem that our present case is far stronger

than the Louisiana case inasmuch as it is elementary that a mere incidental detour to eat a meal does not ordinarily relieve the employer of responsibility where the employee is driving an employer's vehicle with wide latitude as to specific movements of such vehicle.

The Court should further note that in the present case all of the activities occurred on the United States Naval base and if the employer in any way disapproved of the action of its employee, such employer was certainly in a position to enforce a different course of conduct. If the employer had made any rule forbidding the carrying of passengers in such type vehicles, the Government failed to bring out this fact at the time of the trial.

Conclusion

It is apparent that the servant was acting in the regular course of his duties and plaintiff relies on the servant's own statement that he simply lost control of his vehicle so far as proof of negligence is concerned. It would seem that negligence must be inferred in such circumstances. The Court has available a large amount of medical reports indicating that over the course of the past twenty-two months the plaintiff has endured numerous operations and certainly must have suffered severe and long continued pain and agony. It likewise seems clear that plaintiff will have a substantial amount of permanent disability in his injured leg which will affect his earning power.

The evidence shows that the plaintiff was fifty-

two years of age, and aside from his extra work as a barber, was earning approximately \$400.00 per month. We take it that it would be fair to assume that the plaintiff's average earnings over the past twenty-two months after deduction of taxes would amount to approximately \$7,500. If we assume that plaintiff had continued reasonably active working until the age of sixty-five, or another period of thirteen years, we believe it is fair that the Court should add a loss of future earnings in the sum of approximately \$20,000. We arrive at this figure by assuming the earning disability to be approximately 50% or \$2,000 per year, which would equal over the course of thirteen years the sum of \$26,000. Calculating such sum with the reasonable earning power of money at about 3%, we then have a present value of approximately the aforementioned \$20,000.

Any award for pain and suffering rests, of course, within the Court's own discretion, but we feel that \$10,000 is certainly a reasonable compensation for such loss. Plaintiff therefore earnestly requests the Court to award to the plaintiff the following sums:

1. Loss of earnings to date \$7,500;
2. Loss of future earnings, \$20,000;
3. Pain and suffering, \$10,000; total \$37,500.

Respectfully submitted,

/s/ SHERIDAN DOWNEY, JR.,
Attorney for Plaintiff.

State of California,
County of Alameda—ss.

Zilpha Lambert, being first duly sworn, deposes and says: That she is employed by Sheridan Downey, Jr., attorney for plaintiff in the foregoing action; that her business address is 1212 Broadway, Oakland, Alameda County, California; that she is a citizen of the United States over the age of eighteen years and a resident of the County of Alameda, the county wherein the mailing referred to herein occurred; that she is not a party to the cause and that on November 10, 1948, she enclosed a true copy of Trial Memorandum in a secure envelope addressed as follows:

FRANK J. HENNESSY
United States Attorney
422 Post Office Building
San Francisco 1, California
Attention Mr. Deasy

that she securely sealed the same and deposited it, postage fully prepaid, in the United States Post Office at Oakland, California; that there is regular daily communication by mail between Oakland, California, and San Francisco, California.

/s/ ZILPHA LAMBERT.

Subscribed and sworn to before me this 10th day of November, 1948.

[Seal] /s/ AGNES B. THOMPSON,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed Nov. 15, 1948.

[Title of District Court and Cause.]

TRIAL MEMORANDUM

I.

The Government Employee Was Not Acting in Line of Duty

The evidence before the court in this case consists of the testimony of the plaintiff, the statement of John F. Moore, and statements of fact admitted to be true by the plaintiff under Rule 36.

The evidence establishes that Moore, the government employee, was an enlisted man in the United States Army; that on the afternoon of December 22, 1946, Moore's duties required him to proceed from the Ground Ammunition Depot on Guam to the Dispensary at the Fifth Service Depot in order to turn in his daily report; that before leaving the Ammunition Depot, he met the plaintiff and asked plaintiff if he would like to go for a ride with him; plaintiff and Moore then went into the clubrooms at the Ammunition Depot, and met several navy enlisted men; they all listened to a football game; Moore did not remain with the others all the time. Plaintiff and the sailors decided to proceed to plaintiff's quarters at the Naval Air Base on Guam in order that plaintiff might cut their hair; they asked Moore to drive them to the air base, which he did. Plaintiff cut the sailors' hair; Moore did not stay with them while this was being done. When the barbering was completed, plaintiff and the three sailors agreed to go to plaintiff's eating place, which was about one and one-half miles distant from his

quarters. They asked Moore to drive them there, which he did; they all ate together; Moore then mentioned that he had to turn in his daily report. The sailors asked Moore to first drive them back to their quarters at the Ground Ammunition Depot. Moore, plaintiff and the sailors got in the vehicle, and started out for the Ammunition Depot. One of the sailors asked Moore to proceed to the Island Command Brig in order that the sailor might transact some private business there. Moore drove to the Brig, where all parties remained for about five minutes. They then resumed the trip to the Ammunition Depot. En route, the vehicle overturned, and the plaintiff was injured. This happened on a Sunday.

What does this evidence establish? That Moore was operating the vehicle while "acting in line of duty"? We think not. It establishes on the contrary that he was using the vehicle for every purpose that came to his or the other persons' minds except the purpose for which he was required by his duties to use it. In his statement and at the trial of this case, it was stipulated by the plaintiff that if called as a witness by the government, he would testify in accordance with the matters set forth in the statement, he says: "I was going to go to the Dispensary at the Fifth Service Command to take in my daily report." It then occurred to him to take the plaintiff to another place on Guam. Before setting out for either place, the two of them met three sailors who wanted their hair cut by the plaintiff. In order to allow plaintiff to transact

this business, they asked Moore to take them all to plaintiff's quarters. He did so, this being a departure from his line of duty. After this business, they wished to go some place one and one-half miles away in order to eat dinner. Moore took them there. This was Moore's second departure from his line of duty. He then remembered that he had to turn in his report, and mentioned this to the others. They decided that he should drive the sailors to the Ground Ammunition Depot, (the place from which he had originally started). They set out on this trip, Moore thus again departing from the line of duty. En route, one of the sailors thought of some place else to go—the Island Command Brig. They proceeded there, Moore again departing from the line of duty. After stopping at the Brig, they proceeded towards the Ground Ammunition Depot, where the sailors had their quarters,—not the place where Moore was to turn in his report, but the place from which he had originally set out in order to drive to the Fifth Service Depot to turn in the report. En route the accident occurred. Had there been no accident, Moore would have arrived at the place from which he started before he met the plaintiff that day. At the time of the accident, which occurred en route towards the Ammunition Depot, Moore's duties required that he should have been proceeding from the Ammunition Depot towards the Fifth Service Depot Dispensary.

There is no analogy between the facts in this case and those in the case cited in plaintiff's Trial Mem-

orandum, *Campbell vs. U. S.*, 75 Fed. Supp. 181. In that case, which is a decision of a District Court in Louisiana, and is now under appeal, the plaintiff was run into and knocked down by a sailor who was one of a group running to reboard a train after being allowed a short period of recreation. The group was under command of an officer, proceeding under orders by train from one naval depot to another, and the sailor's duty was to be aboard the train when it left the station. In order to catch the train, he was running along the platform. In attempting to catch the train, he was not departing from the line of duty as was Moore in the case at bar. We do not agree with the District Court's conclusion in the cited case, but concede that there is a great deal more to be said in support of it than there is to be said in support of the plaintiff's contention in the case at bar.

II.

There Is No Evidence That Moore Was Guilty of
Any Wrongful or Negligent Act or Omission

Very little appears from the evidence concerning the cause of the accident. From the admitted facts, it appears that the vehicle overturned while in motion.

From the testimony of the plaintiff, it appears that the vehicle was proceeding along a "black top" road. He testified: "We were starting down a long hill. The car began to shimmy. I don't remember what happened after that."

Moore's testimony, as embodied in his statement, is as follows:

“We * * * started back to the Naval Ammunition Depot. We had not gone very far when the truck seemed to slide. I tried to keep control but could not. I do not remember what happened after that.”

Aside from the foregoing, there is absolutely no evidence as to the accident.

Even this evidence gives no hint as to what caused the accident.

“The car began to shimmy”—“The car seemed to slide.” This testimony does not point to any negligence on the part of the driver.

When the car started to “shimmy” or “slide,” what did Moore do to prevent an accident? He says: “I tried to keep control but could not.” Is that negligence?

We respectfully submit that the evidence in this case will not support a finding of negligence on the part of Moore.

III.

Damages

The plaintiff testified that he is fifty-one years of age; that he has during his life worked at various occupations. He has been a rough painter; he has been a hardwood floor mechanic; he has been a truck driver. Before going to Guam, he worked as a rough painter. That was his occupation on Guam, although he had some additional income from barbering. He is not a licensed barber. He worked about three weeks on Guam before he was injured. He estimates his salary from the Navy at

about \$400.00 per month, and at \$12 to \$15 per day from barbering. There should be considered the special circumstances surrounding his employment at the time of the accident. His salary from the Navy was based upon overseas employment, necessarily higher than he would have received on the mainland. His income from barbering he could obtain only at such a place as Guam. His inability to obtain a license in California would have cut it off completely upon his return home.

IV.

Conclusion

It is respectfully urged that the evidence in this case establishes that the government employee, John F. Moore, was not acting in the line of duty at the time of the accident; that the plaintiff has not shown by a preponderance of the evidence that John F. Moore was guilty of any negligent or wrongful act or omission in the operation of the automobile which proximately caused the accident, and that the evidence shows that plaintiff's injuries were caused by an unavoidable accident. It is submitted that the defendant is entitled to judgment in its favor.

Respectfully submitted,

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 10, 1948.

[Title of District Court and Cause.]

ORDER

This matter having been tried, argued, briefed and submitted for decision and the same having been fully considered,

It Is Ordered that judgment be and the same hereby is entered in favor of plaintiff in the amount of \$12,500, Findings of Fact and Conclusions of Law to be prepared accordingly.

Dated: January 21, 1949.

/s/ GEORGE B. HARRIS,
U. S. District Judge.

[Endorsed]: Filed Jan. 21, 1949.

[Title of District Court and Cause.]

PROPOSED AMENDMENTS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly to be heard before the above-named Court, United States District Judge George B. Harris presiding, and said action proceeded to trial on the 4th day of November, 1948; plaintiff appeared in person and by his attorney, Sheridan Downey, Jr., and the defendant United States of America appeared by Daniel C. Deasy, Assistant United States Attorney; evidence both oral and documentary was intro-

duced on behalf of the plaintiff in support of the several allegations of his complaint and on behalf of the defendant in support of the several allegations of its answer; thereafter said cause was argued orally and written memoranda on behalf of the parties were submitted to the Court and said cause was then duly submitted to the Court for decision;

The Court having considered all the evidence in the case, the arguments of counsel, the written memoranda filed by the parties herein, and being fully advised in the premises, now makes the following

Findings of Fact

I.

The allegations of plaintiff's first amended complaint for damages contained in paragraphs I, II and III thereof are true.

II.

It is true that on the 22nd day of December, 1946, plaintiff was employed by the United States as a civilian employee of the Navy Department and that said plaintiff was residing in certain barracks provided by the defendant for its civilian employees upon the Island of Guam; that the said 22nd day of December, 1946, was a Sunday and the plaintiff was not engaged on that day within the scope of his employment by the defendant.

III.

It is true that on the 22nd day of December, 1946, at about the hour of 5:30 o'clock p.m. of said day, plaintiff was riding in a certain Government-owned motor vehicle, to wit, a certain converted naval ambulance upon the Island of Guam, which was at that time and place being operated by one John F. Moore, a Chief Pharmacist Mate in the United States Navy; that it is not true that at said time and place the said John F. Moore was operating said motor vehicle in the line of duty; that it is true that the said John F. Moore was operating said motor vehicle on business outside his line of duty, to wit, for the convenience of himself, the plaintiff and certain other persons who were riding in the vehicle at said time and place.

IV.

It is not true that at said time and place said John F. Moore operated said motor vehicle in a careless, reckless or negligent manner; that it is not true that the plaintiff was injured as a proximate result of any careless, negligent or wilful act or omission on the part of said John F. Moore.

V.

It is true that the said motor vehicle overturned while the plaintiff was riding therein and that plaintiff sustained certain fractures of the right leg as a result of said overturning of said vehicle.

VI.

It is not true that plaintiff sustained any damages as a result of any careless, negligent or wrongful act or omission on the part of said John F. Moore.

VII.

It is true that the accident referred to in plaintiff's complaint herein and the injuries which he sustained as a result of the overturning of said motor vehicle were due to and caused by an unavoidable accident.

From the foregoing facts the Court makes the following

Conclusions of Law

I.

That the naval employee, John F. Moore, was not acting in the line of duty within the meaning of the Federal Tort Claims Act (T. 28 USCA, Section 971);

II.

That the said naval employee was not guilty of any carelessness or negligence and that the injuries sustained by the plaintiff were not due to or caused by, and did not result from, any careless, negligent or wrongful act or omission on the part of said naval employee;

III.

That the defendant herein is entitled to judgment

against the plaintiff for its costs of suit incurred herein.

Let judgment be entered accordingly.

Done in open Court this day of March, 1949.

.....,

Judge of the Above-Entitled
Court.

Lodged March 4, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on duly and regularly to be heard before the Honorable George B. Harris, Judge, and said action was thereafter and on the 5th day of November, 1948, duly and regularly tried.

Plaintiff appeared in person and by his attorney, Sheridan Downey, Jr.; the defendant United States of America appeared by its attorneys Frank J. Hennessy and Daniel C. Deasy.

On said trial both oral and documentary evidence was introduced on behalf of the parties, thereafter said cause was argued orally and written statements on behalf of the parties were submitted to the Court and was then duly submitted to the Court for decision.

The Court having considered all of the testimony,

the arguments of counsel, the written statements of the parties and all of the evidence, and being fully advised in the premises now makes the following:

Findings of Fact

I.

That the allegations of plaintiff's first amended complaint for damages, paragraphs I, II, and III are true.

II.

As to paragraph IV of plaintiff's complaint the Court finds that on the 22nd day of December, 1946, at or about the hour of 5:30 o'clock p.m. thereof, the plaintiff was accompanying a certain Naval employee, to wit, John F. Moore, a chief pharmacist's mate, in a certain converted Naval ambulance en route from a certain place in the town of Agana on the Island of Guam to the Fifth Service Dispensary Depot; that said Naval employee was going to the Fifth Service Dispensary Depot for the purpose of turning in his daily report; that during the said ride the said John F. Moore so carelessly operated the said vehicle so as to cause the same to turn over and to cause certain injuries to plaintiff.

III.

As to paragraph V of plaintiff's complaint the Court finds that the plaintiff sustained certain fractures of the right leg and that as a result of said fractures and the subsequent prolonged treatment the knee joint will remain permanently stiffened to a substantial degree.

IV.

As to paragraph VI of plaintiff's complaint the Court finds that at the time of the accident plaintiff was a well and able-bodied man and earning a regular income as a painter and barber; that since the happening of the accident plaintiff has been unable to perform any gainful work and will be to some extent handicapped from performing such work in the future.

V.

As to paragraph VII of plaintiff's complaint the Court finds that the plaintiff has been damaged in the sum of \$12,500.00.

From the foregoing facts the Court makes the following

Conclusions of Law

(1) That the Naval employee, John F. Moore, was acting in the line of duty within the meaning of the Federal Tort Claims Act, title 28, Section 971, U.S.C.A.

(2) That the said Naval employee was guilty of carelessness and negligence and that such carelessness and negligence proximately caused certain personal injuries to plaintiff.

(3) That plaintiff is thereby entitled to Judgment against the United States of America in the sum of \$12,500.00, and each party is to bear his own costs of suit.

Let judgment be entered accordingly.

Done in open Court this 11th day of March,
1949.

/s/ GEORGE B. HARRIS,
Judge of the Above-Entitled
Court.

Approved as to form:

/s/ DANIEL C. DEASY.

[Endorsed]: Filed March 11, 1949.

In the District Court of the United States for the
Northern District of California,
Southern Division

No. 27594-H

ELMER R. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled action came on regularly for trial on the 5th day of November, 1948, before the above-entitled Court, the Court sitting without a jury, and said action was thereafter and on the 5th day of November, 1948, duly and regularly so tried, and was thereupon submitted.

On said trial plaintiff appeared in person and by his attorney, and defendant, United States of America, appeared by its attorneys.

There the Court rendered, made and filed herein its findings of fact and conclusions of law and ordered that plaintiff have judgment against defendant for the sum of Twelve Thousand Five Hundred (\$12,500.00) Dollars.

Wherefore, by reason of the premises it is Ordered, Adjudged and Decreed that plaintiff do have and recover of and from United States of America, defendant, the sum of Twelve Thousand, Five Hundred (\$12,500.00) Dollars.

Done in open Court this 16th day of March, 1949.

/s/ GEORGE B. HARRIS,
Judge of the U. S. District
Court.

Approved as to form as provided in Rule 5 (d).

/s/ FRANK J. HENNESSY,
/s/ DANIEL C. DEASY,
Attorneys for Defendant.

Entered in Civil Docket March 17, 1949.

[Endorsed]: Filed March 16, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now the defendant United States of America, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment entered by the United States District Court for the Northern District of California in favor of the plaintiff and against said defendant, on March 17, 1949.

Dated: March 18, 1949.

/s/ FRANK J. HENNESSY,
By /s/ DANIEL C. DEASY,
U. S. Attorney,
/s/ DANIEL C. DEASY,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed March 18, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, It Is Hereby Ordered that the appellant herein may have to and including May 28, 1949, to file the Record on Appeal in the United States Court of Appeals for the Ninth Circuit.

Dated: April 19th, 1949.

/s/ GEORGE B. HARRIS,
U. S. District Judge.

[Endorsed]: Filed April 19, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH THE DEFENDANT INTENDS TO RELY ON APPEAL

Defendant hereby designates the points on which defendant intends to rely on the appeal of said cause to the United States Court of Appeals for the Ninth Circuit, this designation to be filed with the transcript of record:

1. The District Court erred in denying defendant's motion for judgment in favor of the defendant.

2. The District Court erred in making the following findings of fact:

(a) That John F. Moore was acting in line of

duty at the time the automobile he was driving overturned.

(b) That John F. Moore at said time was operating said automobile carelessly.

(c) That said automobile overturned by reason of carelessness on the part of John F. Moore in the operation of said automobile.

(d) That plaintiff was injured as a result of carelessness on the part of John F. Moore.

(e) That plaintiff has been damaged in the sum of \$12,500.00.

3. The District Court erred in making the following conclusions of law:

(a) That the Naval employee, John F. Moore, was acting in the line of duty within the meaning of the Federal Tort Claims Act, Title 28, Section 971, U.S.C.A.

(b) That the said Naval employee was guilty of carelessness and negligence and that such carelessness and negligence proximately caused certain personal injuries to plaintiff.

(c) That plaintiff is thereby entitled to judgment against the United States of America in the sum of \$12,500.00.

4. The District Court's Findings of Fact and Conclusions of Law are not supported by the evidence.

5. The District Court erred in refusing to make the following Findings of Fact:

(a) That John F. Moore was not acting in the

line of duty at the time the automobile he was operating overturned.

(b) That John F. Moore was at that time operating the vehicle on business outside his line of duty, to wit: for the convenience of himself, the plaintiff and certain other persons who were riding in his vehicle at said time and place.

(c) That John F. Moore at said time was not operating the vehicle in a careless, reckless or negligent manner.

(d) That plaintiff was not injured as a proximate result of any careless, negligent or wilful act or omission on the part of said John F. Moore.

(e) That plaintiff did not sustain any damage as a result of any careless, negligent or wrongful act or omission on the part of said John F. Moore.

(f) That the accident referred to in plaintiff's complaint and the injuries which he sustained as a result of the overturning of said motor vehicle were due to and caused by an unavoidable accident.

6. The District Court erred in refusing to make the following Conclusions of Law:

(a) That the Naval employee, John F. Moore, was not acting in the line of duty within the meaning of the Federal Tort Claims Act (T. 28 U.S.C.A., Section 971).

(b) That the said Naval employee was not guilty of any carelessness or negligence and that the injuries sustained by the plaintiff were not due to or caused by, and did not result from any careless, negligent or wrongful act or omission on the part of said Naval employee.

(c) That the defendant is entitled to judgment against the plaintiff.

7. The judgment is void.

Dated: April 20th, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney,

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed April 29, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To: The Clerk of the above-entitled Court and to
Messrs. Hildebrand, Bills & McLeod, and
Sheridan Downey, Jr., Attorneys for Plaintiff:

The defendant, United States of America, by its
attorneys herein, hereby designates for inclusion
in the transcript of record upon appeal, the complete
record, and all the proceedings and evidence in
the action.

Dated: April 20th, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney,

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed April 29, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents and accompanying exhibits, listed below, are the originals filed in this above-entitled case, and that they constitute the record on appeal herein, as designated by the appellant:

Complaint for Damages.

First Amended Complaint for Damages.

Answer to First Amended Complaint.

Request for Admission of Facts.

Answer to Request for Admission of Facts.

Memorandum of Fact and Law Relating to Pre-trial Conference.

Trial Memorandum (By Plaintiff).

Trial Memorandum (By Defendant).

Order (For Judgment).

Proposed Amendments to Proposed Findings of Fact and Conclusions of Law (Lodged 3/4/49).

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Order Extending Time to Docket.

Statement of Points on which the Defendant Intends to Rely on Appeal.

Designation of Contents of Record on Appeal.

Plaintiff's Exhibits Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 & 12.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 6th day of May A. D. 1949.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. Van Buren,
Deputy Clerk.

In the Southern Division of the United States District Court for the Northern District of California

Nó. 27594

ELMER JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

November 5, 1948

Before: Hon. George B. Harris,
Judge.

Appearances:

For Plaintiff:

Sheridan Downey, Jr, Esq.

For the United States:

Daniel C. Deasy, Esq.,

Assistant U. S. Attorney.

PROCEEDINGS

(Following opening statement on behalf of plaintiff and reservation of opening statement by Mr. Deasy, the following proceedings were had:)

The Court: Is Mr. Johnson a resident of Alaska now?

Mr. Downey: No, he lives in Richmond. [1*]

* Page numbering appearing at top of page of original Reporter's Transcript.

ELMER JOHNSON

called as a witness in his own behalf; sworn.

The Clerk: Will you state your name to the court?

A. Elmer Johnson.

Direct Examination

By Mr. Downey:

Q. Mr. Johnson, please just answer the questions now that I ask you, or that Mr. Deasy or his Honor ask you, and keep your voice up so that all of us can hear you; and remember when a question is being asked to wait until it is completed, because this gentleman has to write down everything that you say.

You are living where, Mr. Johnson?

A. My address is 1545 South 54 B 1 D, Richmond, California.

Q. What is your age?

A. 52 next birthday—May 16, 1897.

Q. Over your working life have you had any regular trade or occupation?

A. Well, sir, I have been a barber. I have been a hardwood floor mechanic—not in the trade, though, but I have been a barber and hardwood floor mechanic.

Q. Have you ever done any work involving just being at a desk on a white collar job, so to speak?

A. I did at one time down in Manila, Philippine Islands; but I am not qualified to work here in the United States, because it is a different type of work

(Testimony of Elmer Johnson.)

than what you have to do in the [2] Philippine Islands—much easier.

Q. What were you doing just before you went to Guam to work for the Government?

A. I was painting around Richmond.

Q. Painting? A. Yes, sir.

Q. You went over to Guam, or rather, arrived in Guam about when?

A. I arrived there the 7th of December, 1946.

Q. And the accident we are talking about here was on the 22nd, is that right? A. Yes, sir.

Q. Who employed you while you were working on Guam? A. The United States Navy.

Q. Your occupation was what?

A. A barber.

Q. Were you on a salary, Mr. Johnson?

A. Yes, sir.

Q. What was that, please?

A. A dollar seventy-two an hour.

Q. How much did it amount to a month, or a week, I should say?

A. A dollar seventy-two an hour and time and a half for anything over forty hours, and we were getting six days a week. I did have it figured up, but right now I can't say just exactly, but I think it was around four hundred or a little over, or around four [3] hundred a month, I believe. That is not the exact figure.

Q. What hours were you working, please?

A. I was working from eight o'clock in the

(Testimony of Elmer Johnson.)

morning until five in the evening, with an hour for lunch.

Q. And you did not work on Sundays?

A. No, sir.

Q. What about this barbering that you were doing over on Guam? How much of that had you done after getting to Guam?

A. I started just as soon as I started to work. Did you ask me how much I did?

Q. Yes, how much did you do at the time?

A. I usually made from twelve to fifteen each night.

Q. What did you charge for a haircut?

A. They gave me a dollar.

Q. Where did you do this haircutting work?

A. They fixed up a barber shop in the Navy airbase, where our quarters were.

Q. Were you living in some barracks, or what?

A. Yes, we were living in barracks right there at the Naval airbase.

Q. Were there all civilians living in these barracks, or Naval personnel?

A. It was mixed up—civilians and sailors.

Q. Where did you eat your meals?

A. We had to go about a mile and a half from there down to a [4] place where the sailors ate in Agana.

Q. In which direction were you from Agana?

A. North.

Q. You say about a mile and a half?

(Testimony of Elmer Johnson.)

A. Yes, I believe it was north. I am quite sure it was north, all right.

Q. I will have you come down to this map presently. Now, the accident happened on what day of the week, please?

A. It happened on Sunday, December 22nd.

Q. And so you were not working as a barber that day, is that correct? A. Yes, sir.

Q. Let me ask you if you had previously been acquainted with John Moore, the chief pharmacist's mate who was involved in the accident.

A. No, I just knew him the day before.

Q. How did you happen to meet him the day before? A. He came into the barber shop.

Q. Did you go anywhere outside the barber shop with him on that day before the accident?

A. No.

Q. On Sunday morning what did you do?

A. I barbered a little and he was over there at the Naval Airbase and asked me if I wanted to take a ride with him.

The Court: Whom do you mean by "he"? [5]

Q. (By Mr. Downey): Yes, who is he?

A. John Moore.

Q. What time would you say you first saw him, or that he first came in on that morning?

A. I think it was around 10:30 or 11:00 o'clock.

Q. Did he stay at the job any length of time in that particular period?

A. No, along, possibly, 30 minutes.

(Testimony of Elmer Johnson.)

Q. Then he, you say, asked you to go some place with him? A. Yes.

Q. Did you go? A. Yes, sir.

Q. Where did you go?

A. We went down to the Naval ammunition depot.

Q. About how far was that from where your barber shop was?

A. It seems to me like it was a mile and a half or something like that. I can't say for sure.

Q. Was that in the direction of Agana, or the opposite direction?

A. The opposite direction.

Q. And that would be farther north of your quarters? A. Yes.

Q. How did you go there?

A. We rode there. His ambulance had been converted—an old ammunition carrier, and it was converted into an ambulance. [6]

Q. When you got to the ammunition base what did you do?

A. We got about three other sailors there. Mr. Moore was going to go over and turn his——

Q. Just what you saw him do, please, Mr. Johnson. Don't tell us what you think he was going to do.

A. We just went down there and got these other sailors in the clubrooms.

Q. Did you go right to the clubrooms when you got to the ammunition depot?

(Testimony of Elmer Johnson.)

A. We went into another place, first, besides the clubroom, a regular living quarters. I believe they had some medical things in there, too.

Q. Did you observe him do anything with any medical thing? A. No.

Q. Then you met three sailors—in what building was it? A. It was a club room.

Q. Did you know these sailors?

A. No, I didn't.

Q. What did you do after you met the sailors?

A. Listened to a football game, sat there and talked.

Q. How long did you stay there?

A. I stayed there for about three-quarters of an hour.

Q. Did Moore stay there all the time?

A. No, he didn't; he left. He was not there all the time.

Q. You left them about what time of day, if you remember? [7]

A. I believe it was right around noon.

Q. Was Moore with you at the time you left?

A. Yes, he had come back and these fellows wanted me to cut all their hair. We agreed to go up to the barber shop and do the work.

Q. How did you go to your barber shop?

A. Mr. Moore took us up in the same conveyance.

Q. Then when you got back to your job what did you do?

(Testimony of Elmer Johnson.)

A. I proceeded to do this work and cut some other fellows' hair.

Q. Well, how many altogether?

A. I would say about six.

Q. Did you cut the hair of all three of these sailors who were with you? A. Yes, sir.

Q. About how long did that take you—I mean the entire six haircuts you referred to.

A. Well, I imagine it took me, I think, if I am not mistaken, I believe I was there about two and a half hours or three hours.

Q. During that time did Mr. Moore remain with you? A. No, sir, he left.

Q. How much of that time, of that two and a half or three hours was he there in the barber shop?

A. Well, possibly an hour or three-quarters of an hour.

Q. Do you know where he went when he left the shop? [8] A. No, I don't.

Q. Did he make any statement as to what he was leaving for?

A. I understood he was out on some of his duties.

Q. Well, did he make any statement—not what you understood, but just what he said, if you remember.

A. I can't swear as to that.

Q. All right, then, after you had finished with these approximately six haircuts what did you do?

A. Well, they were hungry and they wanted some place to eat, and I told them where I ate my

(Testimony of Elmer Johnson.)

meals, and they said, "Well, we will all go down there," and I think that is where we went.

Q. How did you go down?

A. We went down with Mr. Moore in his converted ambulance.

The Court: We will take a short recess, gentlemen.

(Recess.)

Q. (By Mr. Downey): Mr. Johnson, this place where you ate your meal that afternoon was located where?

A. That is located right near the town of Agana.

Q. With reference to the place you have spoken of where your barracks were, was that north or south?

A. That was north of the place where we ate—I mean our place where we slept, I believe, was north.

Q. North of Agana? A. Yes, sir.

Q. Did you eat in company with Mr. Moore and these sailors? [9] A. Yes, sir.

Q. Do you remember about how long you took to eat?

A. I think right around 35 minutes.

Q. Who operated this eating place, if you know? Was it a Navy eating place, or a private eating place?

A. It was a regular place where sailors ate, you know, like the sailors have.

Q. Were you paying for your meals there?

A. Yes, sir.

(Testimony of Elmer Johnson.)

Q. Did you pay cash, or did you have a meal ticket? A. Yes, cash.

Q. You took how long to eat?

A. About 40 minutes.

Q. Was there any drinking during that time?

A. No, sir, they don't have no liquor at all.

Q. Then what did you do?

A. Mr. Moore stated he would have to go back and turn in his reports where he was stationed, and that is when we started back, and there was one boy, a guard at the guardhouse, that owed him some money, and he said he would stop and see if he could get some money, and he did stop.

Q. Was that guardhouse on the way toward your quarters and this ammunition depot?

A. Yes.

Q. How long did you stop at the guardhouse?

A. About five minutes. [10]

Q. Where were you riding in the vehicle at this particular time?

A. I was always in the right-hand side in the front seat.

Q. How many of you were in the front seat.

A. Just two of us.

Q. And what other passengers were there besides you?

A. There were three other boys—sailors. I didn't know any of them.

Q. Where were you intending to get off the vehicle?

(Testimony of Elmer Johnson.)

A. I was intending to go back to the Naval Air-base where my quarters were.

Q. About how far was it to your quarters to the place where the accident happened?

A. It was a short distance from Agana where the accident happened and it was about a mile and a half from the quarters to Agana. So I would say around a mile and three-quarters or a mile and a half, or something like that, because it was just out of Agana.

Q. What kind of a surface did the road have?

A. It had a black top.

Q. Was it a hard-paved road, or just oil, or what?

A. If I remember right, I thought it was a black tar road, but it might have been oil; but it seemed to us sort of black tar.

Q. Was it a two-lane highway?

A. No, it was just a little old road in Agana, a narrow road going down the hill.

Q. Was there room for a vehicle to pass in the opposite [11] direction?

A. There might have been room for a vehicle to pass in the opposite direction.

Q. As best you remember, just tell his Honor what happened in connection with the accident.

The Court: Q. Was it a well-traveled road used by others in connection with routine business?

A. Yes.

Q. Was it asphalt or just a plain dirt road?

(Testimony of Elmer Johnson.)

A. I believe it was asphalt, just plain black top.

The Court: All right.

Q. (By Mr. Downey): Go ahead and tell what happened.

A. We were just starting down this long hill. It rains quite frequently over there, every ten minutes a shower will come, and the sun will come out, and then it will rain, and then the sun will come out. I think it was dry that day and the car began to shimmy and shake the front wheels, and the accident occurred right then and there. I can't remember. The whole side of my head was just a mass of blood, and I can't hear very well out of this ear yet.

Q. What happened?

A. Anyway, I don't know. My head hit, and that is the end.

The Court: The car started shimmying and you cannot remember what happened?

A. The car started shimmying and I cannot remember what happened. [12]

Mr. Downey: I believe the stipulations of fact cover the fact that the vehicle did turn over.

Q. What next do you remember?

A. The next I remember is, I heard them say in the hospital, "We will take this one. He is hurt the worst." Then they gave me the anesthetic.

Q. You don't know what time it was when you came to? A. No, I don't

Q. Then, after that, what do you remember?

A. What?

(Testimony of Elmer Johnson.)

Q. Then, after that, what do you remember after you heard them say these words about you being hurt the worst—what next do you remember?

A. The next thing, I woke and there were sailors on each side of the bed holding me in bed.

The Court: Holding you?

A. Yes, holding me in bed because you are going through the coming out period, and some cases are violent and some are not.

Q. (By Mr. Downey): Was that the same night, do you know?

A. It was dark. It was very dark, and I believe it was that same night.

Q. How long did you stay there in the hospital on Guam?

A. Well, I arrived back in Oak Knoll Hospital February 5. So I stayed in Guam from December 22nd until that time, excepting a week's stay in Honolulu at Aiea Naval Hospital. [13]

Q. Were you flown back here?

A. Yes, sir, by Naval Hospital plane.

Q. How long were you confined in the Oak Knoll Hospital?

A. You have all the records. I don't remember them exactly. I can't say for sure, but I think it was altogether around fourteen months. You have all the records there.

Q. What were your principal injuries?

A. My right leg had a compound fracture of the tibia and fibula. All of the muscles was taken off

(Testimony of Elmer Johnson.)

the back leg to the bone and one of the leaders was split in two, one of the cords.

Mr. Downey: The doctor will be here and we have the Naval doctor's reports; but you can be brief about this. Your right leg was broken?

A. My right leg was broken, a compound fracture; my ears deafened, and my right shoulder was cracked and bruised all over.

Q. Anything else you noticed besides these that you still notice? A. My side hurts me.

Q. Where?

A. On my right side, here, it hurts and pains very bad, the site of an old injury, and I have developed arthritis.

Mr. Downey: While he says he lost hearing, we had him examined by an ear specialist and he says he has some loss of hearing, but it was not from this injury.

The Witness: Yes, he said it might be from old age, and [14] those machines don't record perfectly.

Q. Are you a licensed barber? A. No.

Q. Have you ever been a licensed barber?

A. No.

Q. How did you happen to be a barber?

A. I tried to learn the barber trade up in Oregon and got discouraged and didn't stay with it.

Q. What have you done since getting out of the Oak Knoll Hospital?

A. I have done practically nothing. I tried to

(Testimony of Elmer Johnson.)

go to Alaska to see if I couldn't do something up there.

Q. What were you doing in Alaska?

A. I got some dishwashing jobs up there.

Q. How much have you earned altogether since the accident?

A. I don't know—not so much.

Q. Well, how much—\$5000, or \$100, or what?

The Court: You can make a tabulation during the recess and submit that.

Mr. Downey: I think that is all.

The Court: The plaintiff has no special or unique training in any craft or trade. He said he had done truck driving and he is a painter—a rough painter.

Q. Do you hold a union card as a painter?

A. No, sir. [15]

Q. How long has it been since you engaged in work as a painter?

A. In the shipyards I worked. Anybody could work as a rough painter.

Mr. Downey: I do want to ask another question. I want to have him point out these places on the map.

Q. Point out the town of Agana.

A. Yes, this is the town of Agana right there.

The Court: Circle it with a red pencil and mark it J-1.

(The witness does as requested.)

Q. (By Mr. Downey): Approximately where

(Testimony of Elmer Johnson.)

were the quarters or barracks that you refer to as the place where you slept and as being the Navy Airbase? A. Right there.

Mr. Downey: We will mark that as J-2.

Q. And the place where you met these sailors and where you referred to as being the ammunition depot? A. That is this place, here.

Q. That is where Mr. Moore took you when you met him first that day and where you encountered these other men? A. Yes.

Mr. Downey: We will mark that J-3. That is all.

Cross-Examination

By Mr. Deasy:

Q. The ammunition depot is J-3 and the Navy Airbase is J-2, and the town is J-1? A. Yes.

Q. Do you know, Mr. Johnson, where this place known as the guardhouse was located?

A. That was just out of Agana, between Agana and my quarters.

The Court: That was the only diversion, was it, on the return trip? A. Yes.

Q. (By Mr. Deasy): That is between J-1 and J-2? A. Yes.

The Court: How long was that stop?

A. About five minutes.

Q. Did he collect the money?

A. No, he didn't.

(Testimony of Elmer Johnson.)

Mr. Downey: May the map be marked as Plaintiff's Exhibit No. 1?

The Court: So ordered.

(Map of Guam was marked Plaintiff's Exhibit 1.)

Mr. Deasy: I don't think there are many questions I need ask Mr. Johnson.

The Court: When did you take up your trade as a barber?

A. No, sir, I tried.

Q. What happened?

A. The Master Barbers Association have it so that a man, to be a barber, has to become practically a physician. Some of them boys have been in there for sixteen or seventeen months and were expert barbers, and can't get in. [17]

The Court: What do you think you could do?

A. There is nothing, it seems like, I can do.

Q. There is something you can do?

A. I haven't found anything yet.

Q. Do you have a pessimistic view about your case?

A. No, but you can't help feeling pessimistic.

Q. Many people suffer injuries and carry on. Do you think there is any gainful occupation you could follow?

A. It seems like there is either a depression or a war. There are too many well men. I tried all the institutions and even tried to go back to Guam, but nothing doing.

(Testimony of Elmer Johnson.)

The Court: What about the civilian storekeepers, supply men, and barber?

A. You can't get by the doctors—even up in Alaska.

Q. What did you do up in Alaska?

A. The only thing I could do is wash dishes.

Q. Did you bring your family? A. No.

Q. How do you live?

A. We have been living on my wife, on what she did, and on what little I made.

Q. You must have some income.

A. Well, her wages.

Q. She has worked? A. Yes. [18]

Q. Upstate? A. Yes.

Q. What kind of work does she do?

A. She works at a bag factory in Oakland.

Q. How old are the children?

A. One 10 and one 4½.

Q. (By Mr. Deasy): Since your return from Guam you have been residing in Alameda County, or Contra Costa County? A. Richmond.

Q. Your family has been living there?

A. Yes, sir.

Q. Where did you live before you went to Guam? A. Lived right there.

Q. As I understand it, on the day the accident happened, when you first encountered Mr. Moore you were around at the airbase?

A. Yes, sir, at the airbase.

(Testimony of Elmer Johnson.)

Q. That is where your sleeping quarters were, is that right? A. Yes, sir.

Q. And he was a pharmacist's mate, and there was some kind of dispensary there where he worked, is that right? A. Yes, sir.

Q. Did he suggest that you come along with him for the ride, is that what it was?

A. Yes, sir.

Q. At that time did he tell you he had any business to transact [19] with the Navy?

A. I can't remember, sir, whether he told me that, or not.

Q. But he told you he had to go some place and asked you to come along for the ride?

A. Yes, sir.

Q. You were then in the place marked J-2, and you proceeded in the automobile with him to what place?

A. Well, to the Naval ammunition depot.

Q. That is up here at the place you marked J-3?

A. Yes.

Q. Prior to your going there you and Mr. Moore met these other three sailors?

A. We met them at the Naval ammunition depot.

Q. In other words, you and Moore were first at the ammunition depot, and that is where you met the sailors? A. Yes, sir.

Q. At that time it was suggested that they would like to have you cut their hair, and you told them if they would go back to your quarters, that is,

(Testimony of Elmer Johnson.)

back to the air base, that you would cut their hair, isn't that right? A. Yes, sir.

Q. And the three of them, and yourself, and Moore got in the ambulance and went back there, is that right? A. Yes, sir.

Q. Was it on that trip from the ammunition depot to the air base [20] that this boy said that he wanted to go and collect this money from the brig?

A. It was after I got through cutting their hair, I believe.

Q. In other words, you made the trip directly, then, without stopping off at the brig, down to your quarters from the ammunition depot to the airbase, and you cut their hair. A. Yes.

Q. And then you all had something to eat?

A. Yes, we had to take this trip to the mess hall about a mile and a half to eat.

Q. After eating, Moore suggested he take you back to your sleeping quarters?

A. Yes, sir, he did, to turn in his report.

Q. That was at the airbase, some place?

A. Yes, sir.

Mr. Downey: Just a moment, I object to that question. That is confusing. I don't know what Mr. Deasy means, that his sleeping quarters were at the airbase.

Mr. Deasy: What I meant was that he had to turn in the report at the airbase.

The Court: You might clarify that.

(Testimony of Elmer Johnson.)

The Witness: Yes, he had to turn in his report near where he was employed down near the ammunition depot. He is employed near the ammunition depot, I believe the 5th Service Depot. That is where he is stationed. [21]

Q. (By Mr. Deasy): Then you understood he had to go back towards the ammunition depot again? A. Yes, sir.

Q. Then you left this place where you had eaten and proceeded in the direction of the airbase, is that right? A. Yes, sir.

Q. Somewhere between those points they stopped at the brig to try and collect this money, is that right? A. Yes, that is the whole picture.

Q. After stopping at the brig he proceeded on towards the airbase? A. That's right.

Q. And the accident happened somewhere in there? A. Yes, sir.

Q. Is this eating place between the airbase and the town of Agana? In other words, is the place where you ate nearer to town than your sleeping quarters, or is it in the opposite direction?

A. It is right in the town.

Q. It is right in the town of Agana?

A. Yes, sir, you can't tell you are in a town only by the name. There is no town there.

Q. It is just a place in a town?

A. It is just a place, that is all.

Q. When I say in town, I meant the place you have marked as J-1 [22] on the map.

(Testimony of Elmer Johnson.)

A. It is just quonset huts is all there is.

Mr. Deasy: That's all.

Mr. Downey: That's all.

The Court: You said you were making about \$400 a month. A. Yes.

Q. What was your base pay?

A. It was \$1.72 an hour, and I think they figured base pay right at \$400 a month for the painting, and on the barbering I was making \$12 to \$15 a night.

Q. Referring to the painting, what did you do?

A. We went over there as direct painters, but they gave us spray guns.

Q. What were you painting, barracks and the like?

A. Everything—just old mess halls and the roughest kind of work. Even rougher than the shipyard work.

Q. How much did you send home to your wife and family? A. I sent it all.

Q. What did you live on?

A. Just took out barely enough for me to live.

Q. How long were you there?

A. I was there only a short time, about two weeks.

Q. And then this accident happened?

A. Yes, sir—just got started there.

Q. How old are you?

A. I will be 52 my next birthday. [23]

Q. Where were you born?

(Testimony of Elmer Johnson.)

A. I was born in Eagle, Idaho.

Q. Do you have relatives in Idaho?

A. Yes, my father and mother are dead.

Q. What are the occupations of your relatives?

A. I have a brother that has a ranch.

Q. Did you ever have anything to do on a ranch?

A. I was raised on a farm.

Q. And do you currently have occasion to see doctors about your condition?

A. The doctor said I should be under a doctor's care now?

Q. Why?

A. I have varicose veins right now all over the right leg.

Q. I notice you walk with a limp. You have an impairment there? A. Yes.

Q. Has that increased or decreased in intensity so far as your locomotion is concerned?

A. It has got—actually, after I took it out of the cast I couldn't walk at all. It has got a little better.

Q. Do you exercise your leg?

A. Yes, I do.

Q. Have you taken some therapy for it?

A. I tried it for two months and all of the doctors threw up their hands.

Q. What about the muscle structure? Has there been some rehabilitation [24] in the muscle structure of your leg?

(Testimony of Elmer Johnson.)

A. This big place never has filled in where all the muscle was taken off.

Mr. Downey: You might pull up your trouser leg.

The Witness: Yes, they have filled in a lot of air—that was one operation, and here is another one, and there is another one. And the ankle is what bothers me. All the ligaments are frozen and this leg is frozen about that far, and it wouldn't surprise me—if I want to get down, I have to lay on the floor if I want to look for my shoes.

The Court: How much time has elapsed from the accident up to now?

Mr. Downey: About 22 months.

The Court: There were no cranial injuries excepting on the side there was blood?

Mr. Downey: He was knocked unconscious, but Dr. Carlson will be here, and as I recall, his report didn't show any serious head injury.

The Court: Dr. Carlson came into the case recently, did he?

Mr. Downey: No, he came into this case and treated him.

The Court: I suppose he has been taking care of him as a charity patient?

Mr. Downey: No.

The Court: Did you pay him? [25]

A. He told me he would take care of me, but I got some bills, by the way, so I couldn't go down any more. I thought it was a misunderstanding, and I just didn't go down.

(Testimony of Elmer Johnson.)

Q. Did you have the money to pay him?

A. No.

Q. You didn't have \$8? A. No.

Q. Did you have any understanding with him at all concerning compensation for testifying, or otherwise? A. No, I should say not.

Redirect Examination

By Mr. Downey:

Q. Mr. Johnson, isn't it the fact that within the last two or three weeks when you came to see me you told me you had gotten bills from Dr. Carlson, and I phoned his office, and he had him send the bills over to me?

The Court: I am not reflecting on the doctor or you, Mr. Downey, but I just wanted to ascertain the fact.

Mr. Downey: The Oak Knoll Hospital has given him long treatments and haven't billed him for it. As to any recovery, the Government would be entitled to that, I don't know. They held he was entitled to treatment in any emergency on Guam, but over at Oak Knoll Hospital, I don't know.

The Court: That was the next point of my examination of this witness.

Q. Have you received any sums of money from the United States [26] Government for disability, or otherwise? A. No, sir.

Q. Have you made application?

A. Yes, I really have.

The Court: You undertook that, did you, Mr. Downey?

Mr. Downey: Yes, he came to see me on every occasion of the denial of compensation. I took steps to inquire in Washington and determined he had simply been turned down on the application.

The Court: Why did they turn him down?

Mr. Downey: Because it was Sunday and he was not working on painting on that day. They didn't object to his doing that, but he was receiving a like amount of pay for barbering, and they will not pay compensation if you are hurt other than in direct performance of your actual duty.

The Court: All right.

Mr. Downey: We have no other witnesses. All the sailors have been discharged from the Navy. The last word I heard was that Moore was in Tompkins, Louisiana, and we have not been able to locate him.

The Court: This case takes on serious proportions on the medical aspect. He has serious injuries of permanent nature. That is apparent to me on inspection of the case, as well as some other cases we have had of this character. I will hear from Dr. Carlson on that score. You might have the Oak Knoll [27] records available for the court.

Do you feel your client may be suffering from a neurosis arising out of this injury?

Mr. Downey: I think undoubtedly he is suffering from a neurosis. He is undoubtedly worried, and any man in that economic condition would be.

The Court: Wherein was there a departure from line of duty on the part of the driver in question?

Mr. Deasy: There is evidence that he told this plaintiff he had to turn in a daily report.

The following facts in the statement of fact have been admitted by the plaintiff to be true:

“That on December 22, 1946, when John F. Moore was an enlisted man, to-wit, a chief pharmacist’s mate in the United States Navy and was stationed on the Island of Guam, attached to the Fifth Service Depot, on duty at Eighth Ammunition Company.”

No. 2:

“That on the afternoon of December 22, 1946 John F. Moore was required by his duties to proceed to the Dispensary at the Fifth Service Depot, to turn in his daily report. Before doing so he met the plaintiff, Elmer R. Johnson, and asked the plaintiff if he would like to come with him. He told the plaintiff that he would take plaintiff [27a] to plaintiff’s quarters at the Navy Air Base, Agana, and the plaintiff agreed to accompany Mr. Moore.”

No. 3:

“That after the conversation referred to in the statement No. 2, plaintiff Elmer R. Johnson and John F. Moore went into the Club Rooms at the Ground Ammunition Depot, where they met Seaman First Class Raymond J. Beulieu, Seaman First Class Homer L. Taylor, and Seaman Second Class William L. Barger. All engaged in conversation and several of the group consumed some beer.”

Those three statements were admitted. The next two statements were not admitted.

Mr. Downey: We will now admit statement No. 4 as being true.

Mr. Deasy: All right, Statement No. 4 reads:

“During the conversation referred to in Statement No. 3, mention was made of the fact that plaintiff was a barber, and the sailors asked plaintiff if he would cut their hair. The plaintiff said that he would if they would come to his quarters at the Naval Air Base.”

Mr. Downey: We now admit No. 5.

Mr. Deasy: All right, No. 5 reads:

“Plaintiff and the seamen asked John F. Moore if he would take them to plaintiff’s quarters, so that plaintiff might cut the seamen’s hair. Mr. Moore agreed to do so.” [27b]

Mr. Downey: That statement has been denied, but it re-reflects a kind of confusion. I believe we can admit it.

Thereafter, they all ate dinner. That is true, but it wasn’t eaten at that place.

The Court: With that noted correction, Mr. Downey, you will admit that, sometime during the course of the evening, they had dinner.

Mr. Downey: That’s right, but not at the place where the hair was cut.

Mr. Deasy: For the record, then, I will read that statement, which is No. 6:

“Thereafter, on December 22, 1946, plaintiff, John F. Moore and the three seamen referred to in statement No. 3, proceeded in a reconverted ambu-

lance belonging to the United States, with Moore driving the same, from the Ground Ammunition Depot to plaintiff's quarters at the Naval Airbase, where they alighted from the vehicle and plaintiff took the seamen to his quarters and cut their hair. Thereafter they all ate dinner."

The next three are admitted, your Honor.

No. 7 is:

"After eating dinner at the Naval Air Base, the seamen asked John F. Moore to take them back to their quarters at the Ground Ammunition Depot, which he agreed to do." [27c]

No. 8:

"While en route to the Ground Ammunition Depot, Seaman First Class Homer L. Taylor asked John F. Moore to drive to the Island Command Brig in order that Taylor might collect some money from one of the sentries at the Brig. Moore then drove the vehicle in which plaintiff and the three seamen were riding, to the Brig for this purpose."

No. 9 reads:

"After stopping at the Island Command Brig, Moore and the others proceeded on their way to the Ground Ammunition Depot. En route the vehicle in which they were riding overturned."

No. 10:

"At the time the vehicle overturned, John F. Moore had not yet turned in his daily report at the Fifth Service Depot Dispensary."

Those are admitted.

The Court: All right, I will hear Dr. Carlson this afternoon. [27d]

Afternoon Session

November 5, 1948—2 P.M.

Mr. Downey: May we proceed?

The Court Yes.

Mr. Downey: Dr. Carlson, will you be sworn?

F. J. CARLSON

called by the plaintiff, sworn.

The Clerk: Will you take the witness stand doctor. Will you state your full name?

A. F. J. Carlson.

Direct Examination

By Mr. Downey:

Q. Doctor, you are a duly licensed practicing physician in the State of California with your office in the City of Oakland, California?

A. Yes, sir.

Q. How long have you practiced medicine?

A. Since 1920.

Q. And you specialize in which branch?

A. Specialize in orthopedics.

Q. Now, you have examined Mr. Elmer Johnson, the plaintiff in this case, at my request, on more than one occasion, Doctor, is that right?

A. Yes.

Q. Will you please go ahead and tell his Honor what you know of the case from your examination, as well as, of course, any [28] history that you got as to injury?

(Testimony of F. J. Carlson.)

A. The patient came to my office on October 27, 1947. The history is that he sustained an accident on December 22, 1946, which resulted in compound fractures of the leg; that this had been treated by Naval surgeons, first on Guam and later at Oak Knoll Hospital; and when I saw him, he was about ready to be dismissed from the hospital.

The patient recounts three major steps of treatment: first, an immediate bone plating operation, using a metal plate. It was done on the day of injury. Second, a removal of the plate for non-union and grafting. Third, sectioning of the fibula, the smaller bone in the same leg to favor final and firm healing in the tibia.

These steps were accompanied by fixation each time. At the time I saw him on October 27, 1947, the cast had been removed and the doctor's opinion was that bony union was then progressive and would take place and become firm. This has later taken place.

My examination findings on October 27th were as follows: That's 1947.

“Patient had had a head injury which I could not substantiate in any particular manner. He had also had a shoulder injury, had essentially recovered and could not be particularly substantiated. He had a leg injury which had resulted [29] in stiffening of the knee and of the ankle; still showed persistent swelling in the leg and discoloration. It showed scars at the mid leg, actually three scars in

(Testimony of F. J. Carlson.)

the same area, and an additional scarring from surgery.”

I have measurements of joint motion.

“Two surgical scars were present. One is on the inner side of the tibia just below the mid level, and this is apparently a composite of three scars. It is well healed and not inflammatory in appearance. The second is a thin well-healed small surgical scar over the lower end of the fibula.

“The calf muscles are very hard and do not move normally and are very thin. Knee action shows 175 over 180 degrees of extension, and 55 over 130 degrees of flexion. The ligaments in the knee are firm. The joint shows some fibrosis of the capsular structures. The blocking in flexion is not sharp. There is no large acute effusion of fluid in the joint.

“Ankle motions show a dorsal flexion of zero from a right angle; a plantar flexion of only about ten degrees. There is some additional foot mobility present at the metatarsal joint, approximately ten degrees. Subastragaloid motion [30] is about one-fourth of normal. This position and this limitation of motion in the ankle prevents the patient from walking by advancing the left or sound foot. Blocking of dorsal flexion prevents the opposite foot from taking a full stride, and the patient therefore gets no full weight bearing on the right leg.”

At this time, I also made x-rays, which, perhaps, will be discussed on the lantern. The patient was in need of further treatment. Outlook for the pa-

(Testimony of F. J. Carlson.)

tient is not too discouraging. He needs a heel lift to begin walking. It would be sound to lift both heels to get the stride even. As ankle dorsal flexion is gained, the heels can be lowered. There will be residual stiffening in both ankle and knee joint, but he should gain sufficient function to walk on level ground without a limp. Hill climbing will be always difficult, and normal stair climbing painful.

Further treatments should be extended over months, rather than a few weeks. There is nothing that will substitute for time in restoring flexibility in the fibrosed muscle tissues in the cast.

I also discussed refracture, which is perhaps more remote now than then.

Q. When did you next see him, Doctor?

A. I have a record here of a visit on the 8th of December, a [31] few brief notes, not transcribed; another record on October 25, 1948, when I prepared a fairly complete summary of the findings then.

Q. What was his condition then, a couple weeks ago? A. (Reading)

“Right foot shows a plantar flexion of 30 or 45 degrees; dorsal flexion of zero over ten degrees. Subastragaloid motion in the heel is one-third normal. Some metatarsal motion is present in the right foot, not quite up to normal. There is also some impairment of dorsal flexion of the big toe, which shows approximately two-thirds normal range. All of these items serve to impair walking capacity,

(Testimony of F. J. Carlson.)

because of sufficient dorsal flexion in the several areas.

“The ankle metatarsal joint and big toe; the right ankle circumference at ten a.m. was 10 over $8\frac{1}{2}$ inches. The right calf circumference is $14\frac{1}{2}$ over $14\frac{1}{2}$. The measurement is not normal. It represents a combination of muscle atrophy and leg swelling, which exactly cancel out each other. The leg shows clusters of varicose veins, just now beginning to appear, when there is some relief from leg swelling. The entire lower third of the leg is brownish and somewhat indurated. Knee [32] flexion is 100 over 140 degrees. Knee extension is practically normal. The right knee grates on motion and shows some thickening of the joint capsule, but not acute fluid effusion. The patient had other complaints. He complains of a pain in the right groin, and is concerned over the return of a hernia, which was repaired by surgery many years ago. An examination was made, and I find soreness and a very minor impulse in the right inguinal ring, but not the large extruded hernia. I cannot know what this will eventually show. There are scars from an ancient hernial repair on both the left and right side. The patient complains of general headaches and stiff neck. The stiff neck is found.

“The forward stooping of the back permits finger tips 8 inches from the floor; side bending, 20 degrees to the right; back rotation is about 60 degrees; back gives an impression of both stiffness

(Testimony of F. J. Carlson.)

and lameness. Neck motions are also impaired. There is a minor degree of stiffening in both shoulders, but not at the elbows, fingers, or wrists.

“Tendon reflexions were observed. The knee jerks are present. The ankle jerks are absent; plantar reflexions were present. [33]

“The patient complains of loss of acuteness of sensation over the right leg from the mid-calf down, in a stocking pattern.

“I note also the large scarring over the back of the calf. The skin of the leg there is puckered by scars, one by 3 inches in area, brown discoloration. This is attached to the calf muscle group. This moves up and down with the effort to use these muscles. The muscles are obviously adherent to the scar, with a deep fibrous muscle scar. This is a further factor in limiting ankle dorsal flexion.”

Q. Well, how do you think he is going to get along—withdraw the question. What treatment, if any, is now indicated?

A. He should have more months of massage on ankle and knee and calf muscles. That would give him further relief from swelling and from some of the stiffening. Some of it will remain.

Q. That is what you just generally call physiotherapy?

A. Yes, it should be done by somebody who really wants to work with his hands on him; not simply with heat.

(Testimony of F. J. Carlson.)

Q. Assuming that such treatment is given, how do you think the leg is going to come out, from the standpoint of doing work such as truck driving, or work as a painter on roof-painting work, or any manual labor?

A. This man should not go back to painting on scaffolding. [34] He is insecure. Truck driving depends upon the job and the truck—a great deal of latitude there. He would certainly not be accepted by any large employer on a medical examination. There would be prejudice against him on the grounds of ineptness in truck driving.

Q. You do think that on level ground, though, that with proper treatment he can get so that he can walk without limping?

A. I expect him to discard the cane and to walk without a cane on level ground leisurely, and to show a limp on any hurrying, and show a limp on uneven ground. The limp will be based on ankle stiffening and on the heel stiffening, which has lost its side play. That is the subastragaloid joint.

Q. Would this massage be for the purpose of helping the circulation, or getting more motion in the ankle, or both?

A. Both. I am more interested in the motion than anything else, in relief from stiffening, and in ease of function over the regions that he now has.

Q. Did I understand you to say, sir, that he had a combination, not only of atrophy, but swelling at the same time?

(Testimony of F. J. Carlson.)

A. Yes, that's always true with these things. The flesh swells, and the muscles are thin and weak—but fleshy, mean fat, skin and filler material, which there is in various areas of the body, essentially fat tissues.

Q. I see. You have the x-rays with you?

A. Yes, sir. [35]

Q. Are those the ones you took just the last examination a couple of weeks ago or earlier?

(Witness goes to shadow box.)

Doctor, be sure and state, when you are referring to the x-ray, when it was taken, and by whose request.

A. The x-rays were taken by myself personally. They are dated by label printed in the film.

The Clerk: You might identify them.

Mr. Downey: Yes, if you are going to refer to this first one, which appears to have been taken October 25, 1947, we will have that marked as Exhibit—

The Clerk: Exhibit 2.

Mr. Downey: And the next one is also taken October 25, 1947; we will ask that that be Number 3.

Doctor, any of these duplicates, in what they show, I would rather not put into Evidence, unless the Court or Mr. Deasy requests it.

Number 3 will be the film the Doctor just handed me, bearing the date October 25, 1947.

The Clerk: Number 4.

(Testimony of F. J. Carlson.)

Mr. Downey: And he has handed me still another x-ray under the same date of October 25, 1947; that will be No. 5.

The Clerk: Five.

Mr. Downey: There is still another one, bearing the same date, which will be No. 6. [35-A]

The Clerk: Six.

Mr. Downey: Then, another picture bearing date of October 25, 1948, which we will ask be admitted as No. 7.

The Clerk: Seven.

Mr. Downey: These were taken exactly one year apart to date, I see; and there is a second one bearing the date of October 25, 1948.

The Clerk: Plaintiff's No. 8.

The Court: So ordered.

(The x-rays referred to were then marked Plaintiff's Exhibit Numbers 1 to 8 inclusive.)

Mr. Downey: Do you want these in, too?

A. Yes.

Q. (By Mr. Downey): Then, these are 9 and 10, respectively. They were both taken October 25, 1947.

All right, Doctor, would you get Exhibit 1 and point out to the Court what that shows?

The Court: Two, it is.

Q. (By Mr. Downey): Exhibit 2.

A. The picture of the right knee of the patient. I point out the even and fairly well preserved joint

(Testimony of F. J. Carlson.)

space, and not too severe a loss of mineral in the tibia; and the fracture at the neck of the fibula.

The next film, Exhibit 3, is part of a pair. It shows [36] identically the same thing.

Exhibit 4 is the side view of the same knee. This brings out mottling in the kneecap, and to some extent in the tibia—otherwise, good joint spaces. It brings out also the fibular neck fracture.

Exhibit 5 is the mid-leg. The large bone is the tibia. A transverse fracture line is seen through the whole width, practically, in this film. There are six screw holes in both shells of the bone, giving the appearance of twelve holes, the marks of the metal plating, the mark of the delay in healing. There is a considerable amount of hard callous formed, which has not served to obliterate the fracture line. The point on the fracture line indicates fibrous play at some time fairly recently.

Number 6 is the leg at the same level, and at the same time on October, 1947. Now, this film gives the appearance of about half-width healing. This area roughened here represents approximately the place where the middle plate had been. This mound represents a bone-grafting operation, very clearly placed on the opposite from the former plating. This was originally a transplant of bone from the patient's iliac, reset, or set in here. The details of that dissection are obliterated by a large, thick callous. This picture is taken at the same time as the one previously described, showing a full frac-

(Testimony of F. J. Carlson.)

ture line across the whole width. They are the same day. It illustrates [37] the fact that the films are ambiguous sometimes. This is a fracture, or possibly the sectioning operation done in the fibula. The fracture in the upper fibular neck of it may have been the sectional operation, rather than the original fracture.

Number 7 is a year later, October, 1948; smooth, firm callous on both sides; rather thick, dense, white callous. The fibrous line is not visible, as seen before. The alignment of the leg is adequate; satisfactory—the fibular alignment in this view, at least, looks good. The picture is free from evidence of bone infection.

Exhibit 8 is the same leg at the same level on another angle. No fracture line is seen. This picture is free from evidence of decayed or dead bone. This line represents not actual disease, but what was produced by the bone-plating operation.

Exhibit 9 is a picture of the patient's entire foot in 1947, a year ago. It was taken to determine how much disturbance there was in the ankle joint. It has a relatively good joint space, and offers the hope that some further motion should be restored. The mottling is the inevitable result of long disuse and long treatment.

Q. There was no fracture in the foot?

A. No fracture in the foot. This foot is the quite lame part of the disability. [38]

(Testimony of F. J. Carlson.)

Q. That just comes from the fact that he had it in a cast and wasn't using it for long?

A. The swelling resulted from several surgical operations and various other factors.

Exhibit 10 is an A. T. view of the foot. The metatarsal joints are present, may be restored. The metatarsal bones are mottled by mineral absorption, but may be restored by use.

That is all.

Mr. Downey: Did you have any questions on the x-rays, Mr. Deasy?

Mr. Deasy: No.

(The witness returns to the witness stand.)

Mr. Downey: I don't think I have any——

Q. Incidentally, you sent him to an ear specialist in Oakland, who determined that there had been no loss of hearing from the injury to his head?

A. I sent him to the ear specialist, and I have his report.

Mr. Downey: Well, is there any objection to his referring to that?

Mr. Deasy: No, I have no objection.

The Court: You might state the conclusions shown by the report, Doctor.

The Witness (Reading): The report is made by Doctor Albert Bowles, Captain Albert Bowles of the U. S. Navy.

“His hearing loss is not particularly disabling, and certainly not sufficient to warrant a hearing aid. I see no reason why his hearing disability

(Testimony of F. J. Carlson.)

should get worse any faster than which we usually ascribe to oncoming years of middle age. The audiogram reading 4.2% loss of hearing in the right ear, and 7% loss of hearing in the left ear.”

Q. In any event, Doctor, that loss as occasioned, according to Doctor Bowles, was not the result of this accident?

A. The Doctor is noncommittal on the point, at least wishes to entertain no definite opinion on it.

Q. Yes.

Mr. Downey: I think that is all.

Cross-Examination

By Mr. Deasy:

Q. Doctor, did you find, on your recent examination, any evidence of osteomyelitis in the leg?

A. No, sir.

Q. It would be your opinion that there would or would not be such a condition developed in the future?

A. He will not develop osteomyelitis. It would be very unusual. The healing has been marked by successful surgical healing each time he has been operated on; and, while it was originally a compound fracture, it has never been complicated by more infection than it would warrant. It was apparently controlled, to begin with.

Q. You feel that, as far as the bones of the leg are concerned, [40] that the prognosis is favorable in that regard, is that right? A. Yes.

Q. And that the man's difficulty will be rather

(Testimony of F. J. Carlson.)

a loss of motion, a loss of limitation of motion in the leg?

A. The man's difficulty will not be based on osteomyelitis, and loss of motion is a major one. Another one is swelling and some discomfort. Persistent swelling, which still shows, is work-incapacitating, and with advancing years it may be more marked.

Q. What was the swelling caused by, in your opinion, at this time?

A. Originally from injury and the necessary surgical treatment until it becomes so chronic that it remains.

Q. Well, is that from some disturbance in circulation, or something of that kind?

A. Yes, he has a disturbance in circulation, consisting of varicose veins; but, quite apart from that, these old, long, leg cases show persistent swelling.

Q. That's something that you expect where there has been fracture of the bones of the leg and repeated treatment?

A. Yes, the age is a large factor in the degree of swelling that remains. When it comes to the middle years, when heart function begins to show less reserve, then the swelling is more persistent.

Q. In your opinion, you feel that he should not, by reason of his condition, return to such an occupation as painting, [41] which would require his climbing ladders, working on scaffolding, or anything of that kind?

(Testimony of F. J. Carlson.)

A. That's true. That is based on his insecurity, his hazard of tripping and coming off balance on this ankle and heel.

Mr. Deasy: I have no further questions.

Mr. Downey: Does the Court have any questions?

The Court: No, I haven't.

Mr. Downey: All right, Doctor, that is all. Thank you.

The Court: I believe I have one, Doctor.

Q. It may appear in the testimony, or it may not: What would be your reasonable estimate of the continuity of treatment, the therapy suggested by you, a year or eighteen months?

A. A year would be a very generous allowance. He should be able to gain all he can in that time.

Q. You have in mind manual manipulation?

A. Massage; spending a considerable period of time over it, not forcing it suddenly and severely and doing a lot at once.

The Court: All right. Thank you, Doctor.

Mr. Downey: Your Honor, I have here a copy furnished me by Mr. Deasy——

The Court: By-the-way, do you have the Oak Knoll records available?

Mr. Downey: No, sir. There is the Guam medical treatment record of the operation there, I guess, up to the time he went [42] to Honolulu, and it's under date of the 21st of June, 1947; seems to be a

summary of the treatment given and the record made.

The Court: May it be stipulated and conceded that there is no claim made herein for hospitalization or medical expense, save and except whatever expense there may be for the doctor?

Mr. Downey: There is no claim at all, sir. I think that he was entitled to treatment at Oak Knoll in some way.

The Court: Let me ask you this question: Upon what basis of principle did Oak Knoll accord this man treatment when they assumed to deny liability on the other hand?

Mr. Downey: I don't know, sir. I asked him that; he has asked me that, and——

The Court: There was an implied admission of liability by reason of the fact that they undertook to treat the man and gave him a good treatment.

Mr. Deasy: I feel, Your Honor, in that regard——well, the man was injured on an island, which is completely in control of the Navy——

The Court: Yes.

Mr. Deasy (Continuing): ——and whether or not he was entitled to compensation depends, of course, on whether or not he was injured in the course of his employment; and that apparently was determined adversely. Now, when that determination was made, I don't know, but the man arrived at the [43] hospital there an emergency case, and they took care of him until they felt, according to the report Mr. Downey has here, he should be evacu-

ated to the Mainland because of the long period of convalescence required. In other words, it was something in the nature of emergency treatment; and I presume, like many doctors, once they started treating him, they were interested in seeing what the eventual outcome would be, and discontinued to afford him out-patient treatment.

The Court: Yes; if there be an additional matter, Mr. Downey or Mr. Deasy, concerning which you desire a stipulation, I suggest that you embrace it in a stipulation concerning the records of Oak Knoll.

Mr. Downey: I don't find the Oak Knoll file up to date, but that which I have had since November 17, 1947, may I ask that that be admitted?

The Court: It may be admitted, if there is no objection.

Mr. Deasy: I am not familiar with what it is; but if it is a record of treatment afforded to him——

The Court: There is no issue on that score.

Mr. Deasy: I don't think that there is any question that he was treated by the Navy; and apparently, from what the Doctor says, they did a pretty good job; and I might state that I have been waiting to receive a copy of the medical report of the examination yesterday, and that may be also offered in evidence when I have received it and had [44] a chance to look it over.

The Court: Yes.

Mr. Deasy: Now, if Mr. Downey has concluded the presentation of his case for the record, I have a motion which I would like to make.

The Court: All right. Mr. Downey, do you submit the matter on the evidence?

Mr. Downey: Yes, with the additional records.

The Court: The records may remain open for that purpose.

The Court: Do you have a motion?

Mr. Deasy: Yes sir, Your Honor. At this time, I would like to have, on behalf of the defendant, United States of America, to move the Court for a judgment in favor of the defendant, upon the grounds, first, that the evidence does not establish the defendant was injured by any act or omission of an employee or an agent of the United States, or member of the Armed Forces, acting in the scope of its employment, or in the line of duty; and, secondly, upon the grounds that the evidence does not establish that there was any act or omission constituting carelessness or negligence, or any wrongful act or omission, on the part of John Moore, Chief Pharmacist's Mate in the United States Navy, which is shown by the evidence, that he was operating the vehicle in which the plaintiff was riding at the time he was injured.

The Court: The motion is denied. [45]

Do you have those two statements in the file, or have they been admitted in evidence?

Mr. Deasy: I have a statement, Your Honor, from the driver of the vehicle—John Moore, the driver of the vehicle, which I think should be read into evidence. It is quite short.

The Court: All right, sir.

Mr. Deasy: Mr. Downey and I stipulated at the time of the pre-trial conference that if John S.

Moore, Chief Pharmacist's Mate, United States Navy, were called and sworn as a witness on behalf of the Government in this case, that he would testify as follows:

"On 22, December, 1946, I was going to go to the dispensary at the Fifth Service Depot to take in my daily report. I asked Ray Johnson, a civilian friend of mine, to go with me, and I told him I would take him to his quarters at the Naval Air Base, Agana. Just before we left, we met three sailors from Naval Ammunition Depot. During our conversation with them, they learned that Johnson was a barber and asked him if we would cut their hair. He said he would if they would come to his quarters; so he took all of them to his quarters, where he cut their hair. It was then chow time, so we ate chow there. Then I agreed to take them [46] back to the Naval Ammunition Depot. One of them wanted to stop at the Island Command Brig to collect some money. We stopped there and started back to the Naval Ammunition Depot. We had not gone very far when the truck started to slide. I tried to keep control, but could not. I do not remember what happened after that."

And I would like to offer this in evidence, Your Honor—the request for admission of facts and the plaintiff's reply thereto, which are on file in the case, and which were read this morning during the arguments that we had.

The Court: I would suggest that they be marked appropriately in evidence also.

The Clerk: They will be marked, if Your Honor please, Defendant's A and B, respectively.

(Request for admission of facts and plaintiff's reply thereto marked Defendant's Exhibits A and B, respectively.)

Mr. Downey: I would like the record to show, in addition to admission which was made in response, and the request for admission of the facts, which is dated 26, May, 1948, this morning, the plaintiff, through his Counsel, admitted as a true statement number 4, statement number 5, and statement——

The Court: Qualified, however, as to 5.

Mr. Downey: No, it was as to 6; and statement that number 6 with the exception that the words, "thereafter they all [47] ate dinner"——

The Court: No, 6 was qualified—no, 5 was an absolute admission—no, 6 qualified as indicated. All right.

Is that your defense, now?

Mr. Deasy: Yes, sir, Your Honor, with the exception that I would like to offer the medical report of the re-examination of the defendant.

Mr. Downey: There will be no objection to that.

The Court: Made by whom?

Mr. Deasy: The doctors at Oak Knoll yesterday.

The Court: You will submit a copy to Mr. Downey?

Mr. Deasy: I will.

The Court: Then, respective Counsel may submit them on both sides.

Mr. Downey: May I have, say, five days to submit?

The Court: I would say you had better take ten days on each side.

Mr. Deasy: All right, Your Honor.

The Court: Then, the matter will be submitted.

The Clerk: May it be continued on the Calendar to December 6th?

Mr. Downey: For submission?

The Clerk: Submission, so I will be sure the briefs are all in.

The Court: Yes, Mr. Downey, you apparently overlooked [48] a schedule of the moneys.

Mr. Downey: Yes, sir.

The Court: You might supply that in the interim.

Mr. Downey: The plaintiff told me that on consultation with his wife, and his best recollection without the written records available, he figures that it amounts to about \$500.00 earned since the date of the accident.

The Court: \$500.00.

Mr. Downey: Which was all earned in Alaska. I can call him back to testify.

Mr. Deasy: We will stipulate that if he were called, he would testify that his earnings since the accident were approximately \$500.00.

The Court: So ordered. That may be entered in the record.

CERTIFICATE OF REPORTER

I, F. J. Sherry, Official Reporter, certify that the foregoing 49 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ F. J. SHERRY. [49]

[Endorsed]: No. 12238. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Elmer R. Johnson, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 9, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12238

UNITED STATES OF AMERICA,
Appellant,

vs.

ELMER R. JOHNSON,
Appellee.

DESIGNATION FOR PRINTING OF
RECORD ON APPEAL

To: the Clerk of the above-entitled Court and to
Messrs. Hildebrand, Bills & McLeod, and
Sheridan Downey, Jr., Attorneys for appellee:

Appellant hereby designates all of the record on
appeal as the record to be printed.

/s/ FRANK J. HENNESSY,
U. S. Attorney,

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney,
Attorneys for Appellant.

[Endorsed]: Filed May 12, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF POINTS TO BE RELIED
ON IN THE APPEAL OF THE ABOVE-
ENTITLED CASE

The Appellant hereby adopts the statement of points filed in the District Court and contained in the record docketed in this Court as its statement of points to be relied on in the appeal of the above-entitled case and hereby designates the said points as the points designated and to be relied on in said appeal.

/s/ FRANK J. HENNESSY,
U. S. Attorney,

/s/ DANIEL C. DEASY,
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Attorneys for Appellant.

[Endorsed]: Filed May 12, 1949.

No. 12,238

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

ELMER R. JOHNSON,

Appellee.

APPELLANT'S OPENING BRIEF.

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No. 12,238

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UNITED STATES OF AMERICA,	}
vs.	
ELMER R. JOHNSON,	
	<i>Appellant,</i>
	<i>Appellee.</i>

APPELLANT'S OPENING BRIEF.

JURISDICTION.

On December 22, 1946, Elmer R. Johnson was injured on the Island of Guam, a territorial possession of the United States, while riding in a motor vehicle belonging to the United States, which was at the time being operated by John F. Moore, an enlisted man in the United States Navy. On September 10, 1947, he filed his complaint for damages against the United States, in the United States District Court for the Northern District of California, Southern Division (R. 2, 3, 4, 5). Thereafter, on October 29, 1947, he filed in said District Court his First Amended Complaint for damages (R. 6, 7, 8, 9) in which he alleged that he was at that time a citizen and resident of the County of Contra Costa, State of California, that he

was injured while riding in a motor vehicle maintained and owned by the United States, that said vehicle was being operated by an employee of the Navy Department of the United States within the scope of his regular duties, that his injury was proximately caused by the carelessness and negligence of said employee of the United States while so acting in line of duty, and that as a result thereof he received injuries to his person to his damage in the sum of \$90,000.00. The United States appeared in said District Court and filed in response to said First Amended Complaint for Damages, its Answer, in which it denied that plaintiff, Elmer R. Johnson, was damaged in any sum, denied that the vehicle was being operated at the time of the accident by any employee of the United States while acting within the scope of his employment or in line of duty, and denied that plaintiff's alleged injuries were the result of any carelessness or negligence on the part of the Navy Department employee, who was operating the vehicle, and alleged by way of affirmative defenses that the injuries and damages complained of, if any, were caused by an unavoidable accident, that they were caused by plaintiff's own contributory negligence, and that at the time of the accident the plaintiff and John F. Moore, the Navy Department enlisted man, were engaged upon a joint venture in the operation of the automobile. (R. 9, 10, 11, 12).

The cause proceeded to trial in the District Court, and judgment was rendered therein against the United States and in favor of Elmer R. Johnson, for damages

in the sum of \$12,500.00, said judgment being entered on March 17, 1949 (R. 45, 46). The United States filed its Notice of Appeal from said judgment on March 18, 1949 (R. 47).

The United States District Court for the Northern District of California, Southern Division, had jurisdiction to hear said cause and render judgment therein under the Federal Tort Claims Act (Title 28 USCA, §§ 931, 932).

This Court has jurisdiction upon appeal under Title 28 United States Code § 1291.

STATEMENT OF THE CASE.

In December, 1946, Appellee Elmer R. Johnson, was a civilian employed by the United States Navy Department upon the Island of Guam. He worked at his said employment, as a painter, six days per week, being free on Sundays. During his off-duty hours, in the evenings and on Sundays, he performed work as a barber, self-employed. He arrived upon Guam December 7, 1946, to commence his employment (R. 56). On Sunday, December 22, 1946, Appellee met John F. Moore, a Navy pharmacist's mate, at the Naval Airbase on Guam (R. 71). Moore was required by his duties that day to proceed in a Navy motor vehicle from the Naval Airbase to the Naval Ammunition Depot for the purpose of turning in his daily report (R. 13, 74). He asked Appellee if he would like to go for a ride with him. They proceeded in the Navy vehicle to the

Naval Ammunition Depot (R. 72). There they met three sailors, including Seaman Homer L. Taylor, in the clubroom. In the course of a conversation, while listening to a football game (R. 60), mention was made of the fact that Appellee was a barber. The sailors asked him to cut their hair. He agreed to do so (R. 60). Appellee and the three sailors asked John F. Moore to drive them to the Naval Airbase, where Appellee had his quarters and barber shop (R. 72-73, 81). Moore agreed, and together with Appellee and the three sailors, proceeded in the Navy vehicle back to the Naval Airbase. Upon arrival, the Appellee cut the sailors' hair, and also that of several other persons. This required about two and one-half or three hours. (R. 61).

Thereafter, the sailors being hungry, Appellee told them where he ate his meals and they all agreed to go there (R. 61-62). This mess-hall was near the town of Agana, about a mile and a half away (R. 51). Moore again drove them. While at the mess-hall, mention was made by Moore about his being required to turn in his report (R. 63). Moore agreed to drive the three sailors back to their quarters at the Naval Ammunition Depot (R. 82). Appellee intended to go back to his quarters at the Naval Airbase (R. 64). They started out in the Navy vehicle to drive the three sailors to their quarters. Enroute, Seaman Homer L. Taylor suggested going to the Island Command Brig to collect some money owed to him by one of the sentries (R. 63, 82). They all proceeded to that place in the same vehicle. They stopped off at the guardhouse

(Brig) for about five minutes (R. 63). Then they proceeded in the Navy vehicle, with Moore driving towards the Ammunition Depot (R. 82).

Enroute, while starting down a long hill, the automobile began to shimmy and shake the front wheels (R. 65). It overturned (R. 82). Appellee received personal injuries as a result of the overturning of the vehicle.

SPECIFICATIONS OF ERROR.

I.

The District Court erred in denying Appellant's motion for judgment of dismissal, because the evidence before the Court failed to establish any claim in favor of Appellee against Appellant upon which relief could be granted.

II.

The District Court erred in finding that John F. Moore, the operator of Appellant's vehicle was acting in line of duty, because of evidence established as a matter of law that said John F. Moore was not acting in line of duty in operating said vehicle at the time of the accident which resulted in Appellee's injuries.

III.

The District Court erred in finding that Appellee was injured as a result of carelessness on the part of John F. Moore in the operation of the Appellant's motor vehicle, because the evidence failed to establish

any careless or negligent act or omission on his part which proximately caused the Appellee's injuries.

ARGUMENT.

I.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF DISMISSAL, BECAUSE THE EVIDENCE BEFORE THE COURT FAILED TO ESTABLISH ANY CLAIM IN FAVOR OF APPELLEE AGAINST APPELLANT UPON WHICH RELIEF COULD BE GRANTED.

A. The Federal Tort Claims Act, being a partial relinquishment of sovereign immunity to suit, must be strictly construed.

There is no right of action against the United States for damages arising out of the tortious act or omission of an employee of the United States except such right as is given by the Federal Tort Claims Act. This Act confers jurisdiction upon the United States District Court to hear, determine, and render judgment upon claims asserted against the United States by certain persons on account of certain acts or omissions on the part of employees of the United States. As a relinquishment of sovereign immunity, it must be strictly construed.

U. S. v. Sherwood (1940), 312 U.S. 584 at 590.

“The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no

matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the government.

Schillinger v. U.S. (1894), 155 U.S. 163 at 166.

The United States District Courts, being courts of limited jurisdiction, have no authority to hear and determine any causes other than those they are authorized by statute to hear and determine. Statutes conferring additional jurisdiction upon the District Courts should therefore be strictly construed.

B. The jurisdiction conferred upon the District Courts by the Federal Tort Claims Act is limited to certain specified types of claims.

The Act confers jurisdiction upon the District Courts to hear, determine and render judgment only upon claims against the United States

“on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damages, loss, injury, or death in accordance with the law of the place where the act or omission occurred.”

Federal Tort Claims Act (Public Law 601, 79th Congress, 2nd Session, Chapter 753, § 410; Title 28 USCA § 931).

If upon the trial of the cause, the evidence fails to establish that the claim sued upon is within the class

of claims enumerated in the Act, the Court has no jurisdiction to render judgment upon the claim, and the action must be dismissed.

The class of claims enumerated in the Act contains two essential elements which must be established by the evidence. If either element is lacking, the claim is not one upon which relief can be granted in the District Court. These elements are:

1. The claim must be for damages caused by the negligent or wrongful act or omission of an employee of the Government;

2. The employee of the Government must have been acting within the scope of his office or employment, or in the case of members of the Army or Navy, acting in line of duty.

We respectfully invite the Court's attention to two decisions of the United States District Courts involving suits brought against the United States under the Federal Tort Claims Act, upon claims for damages for personal injuries arising out of the operation of government owned motor vehicles by enlisted men in the United States Army. In each case a motion to dismiss was made by the defendant United States of America and in each case it was granted.

In the case of

Long v. United States, 78 Fed. Supp. 35,
a case heard in the District Court for the Southern District of California, involving an automobile accident occurring in the State of California, the Court pointed out that it is only in cases where the govern-

ment employee was in fact “acting within the scope of his office or employment” that the United States has consented to be sued, and that if the facts fail to establish that he was so acting, the District Court has no jurisdiction and the action must be dismissed.

In

Cropper v. United States, 81 Fed. Supp. 81, an action brought in the District Court for the Northern District of Florida, the Court cited with approval the decision of District Judge Mathes in the *Long* case, *supra*, and the Court stated, at page 82:

“In construing the Tort Claims Act, however, it must be kept in mind that the government has waived sovereign immunity to suits only as to claims falling squarely within the four corners of the Act.”

- C. The evidence before the District Court having failed to establish that Appellee’s injuries were caused by any wrongful or negligent act or omission on the part of an employee of the Government while acting in line of duty, Appellee’s action should have been dismissed.**

The District Court rendered judgment in favor of Appellee, basing said judgment upon certain findings of fact and conclusions of law which were erroneous and not supported by the evidence adduced upon the trial of the cause.

The District Court found that John F. Moore, an enlisted man in the United States Army, was acting in the line of duty while operating the motor vehicle at the time that it overturned and Appellee was injured. In making this finding the Court erred, as will be shown in section II of this Argument.

The District Court found that Appellee's injuries were proximately caused by carelessness on the part of said John F. Moore. In making this finding the Court erred, as will be shown in section III of this Argument.

Both of these findings being unsupported by the evidence, it follows that Appellee failed to establish a claim upon which relief could be granted by the District Court, and Appellant's motion for a Judgment of Dismissal should have been granted.

II.

THE DISTRICT COURT ERRED IN FINDING THAT JOHN F. MOORE, THE OPERATOR OF APPELLANT'S VEHICLE WAS ACTING IN LINE OF DUTY, BECAUSE THE EVIDENCE ESTABLISHED AS A MATTER OF LAW THAT SAID JOHN F. MOORE WAS NOT ACTING IN LINE OF DUTY IN OPERATING SAID VEHICLE AT THE TIME OF THE ACCIDENT WHICH RESULTED IN APPELLEE'S INJURIES.

A. The District Court's finding that John F. Moore was acting in the line of duty is contrary to all the evidence.

The only evidence before the District Court upon this phase of the case consisted of the admitted facts, the statement of John F. Moore, and the testimony of the Appellee. In order to make a finding it was necessary for the Court to discover in the evidence before it, the answer to each of the following questions:

1. What was Moore required to do on the day of the accident?

2. What did he do?

We summarize here briefly the evidence responsive to each of these questions.

1. "On the afternoon of December 22, 1946, John F. Moore was required by his duties to proceed to the Dispensary at the Fifth Service Depot, to turn in his daily report". (Request for Admission of Facts, R. 13, admitted by Appellee. R. 16, 80). "On 22 December, 1946, I was going to the dispensary at the Fifth Service Depot to take in my daily report". (Statement of John F. Moore, R. 101). "He had to turn in his report near where he was employed down near the ammunition depot. He is employed near the ammunition depot, I believe the 5th Service Depot. That is where he is stationed". (Testimony of Appellee, R. 74).

"Q. Then you understood he had to go back towards the ammunition depot again?

A. Yes, sir". (Testimony of Appellee, R. 74).

"Mr. Moore stated he would have to go back and turn in his report where he was stationed". (Testimony of Appellee, R. 63).

The evidence shows that Moore, in order to turn in his report, was required to drive from the Naval Airbase to the Ammunition Depot, where he was stationed.

2. John F. Moore met the Appellee at the Naval Airbase on the day of the accident (R. 58). He asked Appellee if he would like to take a ride with him (R. 58, 72). Together they drove from the Airbase to the Ammunition Depot in a Navy vehicle operated by Moore (R. 59, 72). Upon arriving at the Ammunition

Depot, Moore did not turn in his report. (R. 15, 16, 63, 82). Instead, Moore and Appellee went to some living quarters and then into the clubrooms, where they met three sailors (R. 59, 60). They spent some time in social conversation, and listened to a football game (R. 12, 16, 60, 80). The sailors learned that Appellee was a barber and asked him to cut their hair, to which he agreed (R. 60, 81). Appellee and the sailors asked Moore to drive them from the Ammunition Depot to the Naval Airbase, where Appellee's barber shop was located (R. 60, 81). Moore drove back to the Naval Airbase, taking Appellee and the sailors (R. 60, 81-82). Appellee thereupon cut the sailors' hair, and also that of the three additional persons (R. 61). This took several hours. Thereafter being hungry, a discussion arose concerning where they should eat (R. 61-62). Appellee told them where he ate his meals and they all agreed to go there (R. 61-62). This mess-hall was about one and one-half miles from the Naval Airbase (R. 57, 73). Moore drove Appellee and the three sailors to this place (R. 62). While they were there, Moore remembered his duty, and mentioned that he would have to go back to the Ammunition Depot to turn in his report (R. 63). The sailors asked him to return them to the Ammunition Depot (R. 82). Moore undertook to do this and agreed to take Appellee back to the Naval Airbase (R. 73, 82). After they started for the Ammunition Depot, one of the sailors asked Moore to drive to the Island Command Brig (guard house) so that he might collect some money from a sentry. Moore drove them all there (R. 82). They stopped off about five minutes and then resumed

the trip to the Ammunition Depot (R. 63, 82). Shortly thereafter, while proceeding down a hill, the vehicle overturned, resulting in injury to the Appellee. At the time the vehicle overturned, Moore had not yet turned in his report at the Ammunition Depot (R. 82).

Does this evidence support a finding that Moore was operating the vehicle in the line of duty at the time it overturned? We submit that it does not.

The evidence shows that Moore's duty required him to drive the vehicle from the Naval Airbase to the Ammunition Depot so that he might turn in a report at that place. The evidence shows that he made the trip required, taking the Appellee with him. Upon arrival, he neglected to turn in his report. Having made the required trip, he then embarked upon a course of travel in the Navy vehicle wholly unconnected with his employer's business, and entirely outside his line of duty.

(a) He drove Appellee and three sailors back to the Naval Airbase upon their own private business—so that Appellee might earn a profit by cutting their hair.

(b) He then drove Appellee and Appellee's customers a mile and a half further, upon a personal venture—so that he, the sailors and Appellee might eat dinner at Appellee's mess-hall.

(c) He then drove to the Island Command Brig upon business of one of the sailors—so that Seaman Taylor might collect a debt.

(d) He then started to drive Appellee and the sailors to their living quarters at the Naval Airbase and the Ammunition Depot respectively—it was upon this trip that the accident occurred.

B. The District Court should have found as a matter of law that John F. Moore was not acting in line of duty at the time of the accident.

The law of the place where the accident involved in this cause occurred is contained in a Civil Code and Code of Civil Procedure in force upon the Island of Guam. These codes were adapted from the California Civil Code and California Code of Civil Procedure in effect in 1943. We submit that, in the absence of reported decisions of the Guam courts, the decisions of the California courts may properly be considered highly persuasive.

Upon the question of the liability of an employer for the acts of his employee and upon the question of what constitutes a departure by an employee from the scope of his employment, there are many decisions of the California courts.

In general it is stated that if an act of an employee is for the benefit of his employer, either directly or indirectly, or fairly to be implied from the nature of the employment and his duties incidental to it, it is within the scope of his employment.

Casselman v. Hartford Acc. & Indem. Company, 36 Cal. App. (2d) 700;

Naudack v. Canini, 29 Cal. App. (2d) 687;

Sullivan v. Thompson, 30 Cal. App. (2d) 675.

On the other hand, if the employee's acts are not for the benefit of the employer or connected in any way with the purpose of his employment but are for the employee's particular and personal benefit or purposes, his acts are not within the scope of his employment.

Nussbaum v. Traung Label, etc. Co., 46 Cal. App. 561.

"As soon as the driver steps aside from the owner's business and enters upon the performance of some independent purpose of his own, he ceases to act as the agent of the owner and the latter's responsibility for his act terminates".

Martinelli v. Bond, 42 Cal. App. 209 at 211.

"If a servant abandons or departs from a business of his master and engages in some matter solely for his own pleasure or convenience, or pursues some object which relates to an end or purpose which may be said to be the servant's individual or exclusive business, and, while so engaged, commits a tort, the master is not answerable, although he was using his master's property, and although the injury could not have been caused without the facilities afforded to the servant by reason of his relations to his master".

Gousse v. Lowe, 41 Cal. App. 715 at 718.

The California Courts have repeatedly held that the use by an employee of his employer's vehicle for the purpose of going to meals is not within the scope of his employment.

Carnes v. Pacific Gas and Electric Co., 21 Cal. App. (2d) 568;

Helm v. Bagley, 113 Cal. App. 602;

Adams v. Tuxedo Land Company, 92 Cal. App. 266;

Humphrey v. Safeway Stores, Inc., 4 Cal. App. (2d) 589;

Kish v. California State Automobile Association, 190 Cal. 246.

So also it has been held that where a driver uses his employer's vehicle for the purpose of going between his place of employment and his residence, that use was personal and amounted to a departure from the scope of his employment.

Kish v. California State Automobile Association, *supra*;

Mauchle v. Panama Pacific International Exposition Company, 37 Cal. App. 715;

Clough v. Allen, 115 Cal. App. 330;

Humphrey v. Safeway Stores, *supra*.

In

Gousse v. Lowe, *supra*,

the employee's duties involved taking his employer's vehicle, when necessary, to the public garage, where it was stored, for supplies. On the date of the accident involved in that case, he did not ask permission to take the car to the public garage, but because he needed gasoline, he took it there during the noon hour. He ate his mid-day meal and serviced the car. Instead of then returning the vehicle to his employer's residence, he drove to a tailor shop two and one-half miles in the opposite direction, in order to have alterations made

upon his overcoat. He made this trip because he concluded that he did not have enough time to take a street care to the tailor shop, get back to the garage, and deliver the car to his employer's residence by two o'clock, as directed. He reached the tailor shop and started back, and when about one mile from the garage had the accident for which it was claimed his employer was liable under the doctrine of *respondent superior*. The Court, in deciding that the employer was not liable, held that the employee was not acting within the scope of his employment. The Court said:

“Upon an errand of his own the man left the garage and had not returned to within a mile of it when the collision occurred. He took his master's automobile, not in furtherance of any business of the master, but solely because it was a quicker means of conveyance than a street car, because without using it he would not have had time to attend to his private business. * * * This is not the case of a mere slight deviation from the line of duty but a departure for the purposes of the servant”.

In the case of

Gordoy v. Flaherty, 9 Cal. (2d) 716,

the employee was a service station attendant whose duties involved going to town to get change and to turn in money at a branch office, there being no prescribed route for these errands. On the day of the accident, he drove to the bank to get change, intending thereafter to go to the branch office to leave the money. He picked up a friend at the bank who requested him

to drive her to her home. He proceeded with her toward the company branch office but instead of stopping thereat, proceeded beyond for the purpose of taking his friend home. About three blocks beyond the branch office the accident occurred, for which it was claimed the employer was liable. The Court held that the employee was not acting within the scope of his employment, saying:

“But it was not a mere deviation when he actually passed the company office and proceeded in the direction of a place which had no relation to the company business. This was a real departure from the employment, despite the fact that he intended subsequently to return to his employer’s business; and during such departure the employer was not liable for the employee’s tort.”

In the opinion in *Gousse v. Lowe*, supra, the California Court cited with approval the decision of the U. S. Circuit Court of Appeals in

Patterson v. Kates, 152 Fed. 481.

In that case the employee had been instructed to drive his employer’s automobile from Atlantic City to Philadelphia. His route took him through Northmount and then Gloucester, which towns were a few miles apart. When he reached Gloucester, he met a man who asked him to take him back to Northmount, which the employee did. Upon reaching that place, he turned about to proceed again to Gloucester, and thence to Philadelphia, but before he reached Gloucester he was involved in an accident. The Court held that he was not acting within the scope of his employ-

ment, having completely abandoned or departed from the purposes of his employment by returning to Northmount and during his return trip to Gloucester. The Court said at (page 483) :

“As it seems to me, the driver had temporarily abandoned his employment and had gone off on an expedition of his own, for a purpose in no way connected with his duty, but, on the contrary, opposed thereto, and I do not think that he could bind his master while he was engaged about his private affairs. Of course he had no express authority to turn back for such a purpose and I am unable to see upon what grounds the master’s assent to his deviation can be fairly implied.”

Where the evidence before the trial court consists of admitted facts, or where there is no conflict in the evidence, the question of whether the employee was acting in the line of duty ceases to be a question of fact and becomes a question of law.

“While ordinarily the question of whether or not the act was within the scope of the servant’s employment should be submitted to the jury, in this case the only evidence was that at the time of the injury the servant was upon a trip for his own purposes contrary to his master’s orders. It is only where reasonable men may differ in regard to the facts that a case should go to the jury. If the facts are admitted or are susceptible of but one meaning, it becomes the duty of the judge to declare the law upon the admitted facts.”

Gousse v. Lowe, supra.

“There is an entire lack of any evidence supporting the theory that Bachman was on his employer’s business or acting within the scope of his employment at the time of the accident. Under this circumstance the question is one of law for the court, namely, is the implied finding supported by any evidence? * * *”

Humphrey v. Safeway Stores, supra.

In the instant case there is no conflict in the evidence, nor is there any dispute as to the facts upon this phase of the case. Moore’s duty required him to drive from the Airbase on Guam to the Ammunition Depot in order that he might turn in a report at that place. He made the trip required by his duty, but did not turn in the report. Thereafter he undertook to drive his employer’s vehicle upon business in no way connected with his duty or his employer’s business, namely, first to transport Appellee’s customers to Appellee’s barber shop; second, to transport Appellee and Appellee’s customers to another place, to eat a meal; third, to drive Seaman Taylor to the guard-house upon personal business of Taylor; and fourth, to drive all persons involved to their respective places of abode.

We respectfully submit that there was not any evidence before the District Court which supports a finding that Moore was acting in the line of duty; that all the evidence was to the contrary; and that the District Court should have found, as a matter of law, that Moore had departed entirely from his employer’s business, and was not acting in line of duty at the time of the accident involved herein.

III.

THE DISTRICT COURT ERRED IN FINDING THAT APPELLEE WAS INJURED AS A RESULT OF CARELESSNESS ON THE PART OF JOHN F. MOORE IN THE OPERATION OF APPELLANT'S MOTOR VEHICLE, BECAUSE THE EVIDENCE FAILED TO ESTABLISH ANY CARELESS OR NEGLIGENT ACT OR OMISSION ON HIS PART WHICH PROXIMATELY CAUSED THE APPELLEE'S INJURIES.

The evidence before the District Court upon the question of negligence in the operation of the automobile is not sufficient to support the Court's findings on this phase of the case.

We quote what we believe to be *all* the evidence before the District Court on this question:

1. **From the admitted statement of facts:**

"After stopping at the Island Command Brig, Moore and the others proceeded on their way to the Ground Ammunition Depot. Enroute the vehicle in which they were riding overturned." (R. 15, 16, 82).

2. **From the testimony (statement) of John F. Moore:**

"We stopped there and started back to the Naval Ammunition Depot. We had not gone very far when the truck started to slide. I tried to keep control, but could not. I do not remember what happened after that." (R. 101).

3. **From the testimony of Appellee Elmer R. Johnson:**

Q. Go ahead and tell what happened.

A. We were just starting down this long hill. It rains quite frequently over there, every ten

minutes a shower will come, and the sun will come out, and then it will rain, and then the sun will come out. I think it was dry that day and the car began to shimmy and shake the front wheels and the accident occurred right then and there. I can't remember. The whole side of my head was just a mass of blood, and I can't hear very well out of this ear yet.

Q. What happened?

A. Anyway, I don't know. My head hit, and that is the end.

The Court: The car started shimmying and you cannot remember what happened?

A. The car started shimmying and I cannot remember what happened.

Mr. Downey. I believe the stipulations of fact cover the fact that the vehicle did turn over." (R. 65).

This is *all* the evidence concerning the manner in which the accident occurred. From this alone the District Court made the following finding of fact:

"that during the said ride the said John F. Moore so carelessly operated the said vehicle so as to cause the same to turn over and to cause certain injuries to plaintiff." (R. 43),

and the following conclusion of law:

"(2) That the said Naval employee was guilty of carelessness and negligence and that such carelessness and negligence proximately caused certain personal injuries to plaintiff". (R. 44).

Is the evidence sufficient to warrant such a finding of fact and such a conclusion of law? We respectfully submit that it is not.

The mere happening of an accident does not import negligence. There must be something in the evidence to establish negligence as a fact.

In order to determine whether the operator of the vehicle was careless or negligent, it is necessary to find in the evidence consisting of admitted facts, the testimony of the witnesses and reasonable inferences drawn therefrom, the answer to the following question:

“Did he do anything which a person of ordinary prudence exercising ordinary care would not have done under the circumstances, or fail to do something which such a person would have done under the circumstances?”

There is no evidence whatsoever in the record as to what the driver did or what he did not do, except his own statement that after the automobile “started to slide”, he “tried to keep control but could not.” There is no evidence from which the Court could determine what caused the vehicle to “slide” or “shimmy”. Was it moving too fast? Did it skid? Was it being driven in some unusual fashion? Was there a mechanical failure of some part of the vehicle’s equipment? The answer to none of these questions is to be found in the evidence.

Appellee, upon the trial of the cause, had the opportunity of supplying the Court with evidence upon this essential element of his case. He did not do so. He was personally in a position to give testimony concerning the actions of the driver of the vehicle. He did not do so. He was riding in the front seat of the

automobile. No one sat between him and the driver. (R. 63). Had there been anything unusual about the driver's conduct, he could have observed it, and could have testified concerning it. He did testify as a witness on his own behalf. He was the plaintiff in the Court below. The burden was upon him of establishing the allegations of his complaint by a preponderance of the evidence. His failure to introduce evidence available to him leads to the inference that such evidence, if introduced, would be unfavorable to him.

He did not testify concerning the speed at which the vehicle was being operated. It may be inferred then, that the speed was not excessive. Had it been, he would have so testified.

He did not testify concerning the conduct of the operator. It may be inferred then, that there was nothing unusual or significant about his conduct. Had there been, Appellee would have so testified.

He did not testify concerning any circumstances connected with the operation of the vehicle or the physical condition of the operator. Had there been anything unusual or significant about the circumstances or the physical condition of the operator, Appellee would have so testified.

Since the burden of proof lay with Appellee, he was under the duty of supplying the Court with all the proof available to him which was favorable to his case. His silence upon material matters must be construed against him.

In order to make the finding of fact and conclusion of law quoted above, it was necessary for the District Court to follow a line of reasoning supported by neither law nor logic, since there was no justification in the evidence for application of the doctrine of *res ipsa loquitur* or any similar evidentiary hypothesis.

To arrive at the Court's conclusion that there was negligence in the operation of the automobile, it is necessary to assume that where there is an automobile accident there *must* be negligence. As we have pointed out, there is a complete lack of evidence in the record regarding what the operator was or was not doing, save that he was operating the vehicle while it was in motion, starting down a long hill. In order to conclude that he was driving in a careless or negligent manner, the Court must have assumed that he was doing something that he should not have done, or that he failed to do something that he should have done.

There is no basis in the evidence upon which the Court could have inferred that he was driving too fast or too slow or too near the edge of the road, that he failed to keep the vehicle in gear, that he failed to apply the brakes, that he was inattentive to his driving, that he was not in control of his faculties, that he was driving a vehicle which he knew was not in proper mechanical condition, that he knew the road was unsafe for travel, or any other *fact* which could be construed to constitute negligence.

In order to make a finding of negligence, it was necessary for the Court to indulge in speculation, since

there was no evidence before the Court as to the cause of the accident.

Findings of fact and conclusions of law, like the verdict of a jury, must be based upon *facts* appearing from the evidence and upon reasonable and logical inferences naturally arising *from such facts*. Inferences, as basis for findings of fact, must arise *from facts* appearing from the evidence and not from *other inferences* supplied by the Court or jury in the place of facts not established by the evidence.

Here, the only *facts* appearing from the evidence are that the vehicle, while starting down a long hill, started to “shimmy” or “slide”, that the driver tried to keep it under control but could not, and that it overturned and Appellee was injured. In order to find from this evidence that Appellee’s injuries were caused by the carelessness or negligence of the driver, the Court must of necessity have resorted to a series of inferences upon inferences.

First, that the car overturned as a result of either the “shimmying” or “sliding” or as a result of the driver being unable to keep it under control;

Second, that the “shimmy” or “slide” was caused by some unspecified act or omission of the driver, or that some act or omission of the driver resulted in his being unable to keep the vehicle under control;

Third, that such act or omission of the driver consisted in his doing something that a person of ordinary prudence exercising ordinary care would

not have done under the circumstances, or his failure to do something that such a person would have done under the circumstances.

We respectfully submit that a finding of fact so evolved is not based upon facts and proper inferences drawn therefrom, but is rather founded upon pure speculation.

CONCLUSION.

For the reasons heretofore set forth, we respectfully submit that the judgment of the District Court should be reversed, and the cause remanded with instructions to the District Court to enter judgment of dismissal in favor of Appellant, United States of America.

Dated, San Francisco, California,
September 7, 1949.

FRANK J. HENNESSY,

United States Attorney,

DANIEL C. DEASY,

Assistant United States Attorney,

Attorneys for Appellant.

No. 12,238

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

VS.

ELMER R. JOHNSON,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

SHERIDAN DOWNEY, JR.,

1212 Broadway, Oakland 12, California,

Attorney for Appellee.

FILED

6-11-1934

PAUL H. CHAPMAN

12-11-34

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No. 12,238

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

VS.

ELMER R. JOHNSON,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Appellant's statement of the facts in the case is substantially correct except that certain of the testimony given by appellee at the time of trial should have been included to clarify the rather sketchy outline of facts as presented in appellant's brief.

Appellee has admitted certain facts as requested by the Government, and among these facts is the statement that on the day of the accident John F. Moore was required by his duties to proceed to the dispensary at the Fifth Service Depot to turn in his daily report; that doing so, he met the plaintiff and asked the plaintiff to accompany him in his vehicle to the naval air-base. (R. 13.) Appellee has further admitted that

following this invitation to accompany Moore in his naval vehicle, several hours elapsed before the accident occurred. During this time the plaintiff spent some time at the club rooms in the ammunition depot, some time in cutting the hair of a number of seamen and some time in eating his evening meal. (R. 13 and 14.)

It is appellee's belief that the last of the request for admissions as phrased by the Government creates a confusion unless carefully studied. It would appear at first glance that Petty Officer Moore should have turned in his report some time early on the day of December 22, 1946, and that notwithstanding the fact that he was at the ammunition depot where the report was regularly turned in, he nevertheless postponed his duties for a period of several hours. Appellee feels that a careful study of the language in question indicates merely that appellee has conceded that on the day of December 22 at the completion of his duties that Moore was to turn in a report, but it is perfectly clear that appellee has not admitted that the report was to be turned in immediately following Moore's invitation to appellee to accompany him in his vehicle.

Appellee wishes to call the Court's attention to the testimony of appellee which makes the activity of Moore far more clear.

Johnson met Moore near his quarters at the naval airbase approximately one and a half miles north of the "town" of Agana. (R. 58.) Moore performed cer-

tain duties at that locality for approximately thirty minutes. (R. 58.) Moore then took Johnson in his naval vehicle to the naval ammunition depot approximately a mile and a half south of the airbase. (R. 59.) They first went in to certain living quarters where there were some medical things, then they went into the club rooms. Plaintiff stayed in the club rooms for about three quarters of an hour, but Moore was gone during part of that time. Then Moore came back and took Johnson and some sailors back to the airbase where Johnson cut the hair of about six sailors. (R. 60 and 61.) During the time that the hair was being cut, Moore did not remain at the barber shop all of the time. He remained there approximately three quarters of an hour. Johnson was not aware of what Moore was doing during the balance of the two and a half hour period. (R. 61.) Moore then drove Johnson and certain sailors north to Agana where the men ate their evening meal. This took about thirty-five minutes. (R. 62.) Moore then stated that he would have to go back to turn in his reports where he was stationed. It is clear that from the Government's request for admission of facts that Moore was stationed at the ammunition depot, and his report would have to be turned in there at the Fifth Service Dispensary. Moore agreed to take Johnson to his quarters enroute. (R. 63.) It is clear from the testimony of plaintiff and from the map introduced in evidence as Plaintiff's Exhibit No. 1 *that the place where plaintiff was to be dropped off was on the route which Moore would have to take in order to return directly to the Fifth Service*

Dispensary at the ammunition depot. On the road back, they stopped at the guardhouse for a few minutes and then proceeded toward plaintiff's quarters and toward the ammunition depot. The accident occurred shortly afterwards.

ARGUMENT.

I.

THE SERVANT OF THE GOVERNMENT WAS ACTING IN THE LINE OF DUTY.

It is appellee's firm belief that a reading of the entire testimony discloses that the petty officer was unquestionably authorized to drive a certain converted ammunition carrier; that he was on duty the day of the accident; that it was necessary to drive the vehicle to many different parts of the naval base on Guam; that never during the day was the vehicle taken from the naval base; that there was no prohibition from his superior officers which would have prevented him from offering rides to other naval employees where such rides could be given as an incident to his regular movements with the vehicle; that the accident occurred at a time when the petty officer was proceeding by the shortest and most direct route to perform a regular duty for the navy: to-wit, the turning in of his daily report; that it would be unfair to require appellee to prove that during those parts of the afternoon when Moore was absent from appellee's view that Moore was actually engaged in service of the navy.

The fact that Moore ate dinner at a regular naval eating place prior to turning in his report would seem to be consistent with the apparent latitude granted to him in operating the vehicle somewhat at his own discretion. Counsel for appellee has previously submitted a brief for the benefit of the trial Court which sets forth those Federal decisions which appear to shed most light on the question of responsibility of the master for the acts of his servant when the servant is operating the motor vehicle of the master. We wish to call to the Court's attention those citations which are found in the reporter's transcript, pages 21 to 24.

It would seem that the decision of the Eighth Circuit in *Thomas v. Slavens*, 78 Fed. (2d) 144, and the decision of the Ninth Circuit in *Babcock v. Tam*, 156 Fed. (2d) 116, fairly express the rule to be followed in determining responsibility of the master for the acts of a servant while operating a motor vehicle.

At the time of the trial no Circuit Court had as yet found occasion to decide a case involving a question of the meaning of the words "Line of duty," as found in the Tort Claims Act. Since that time two decisions have been handed down. One of these was a decision of the Fifth Circuit, *United States v. Campbell*, 172 Fed. (2d) 500, and the second was also a decision by the Fifth Circuit, *Hubsch v. United States*, 174 Fed. (2d) 7. In the *Campbell* case the Circuit Court reverses the lower Court where the lower Court awarded judgment to an elderly woman who was knocked down when run into by a sailor who was running to

catch a train at a railroad depot. In the *Hubsch* case the Circuit Court upheld the lower Court in finding that liability against the Government could not be established where an army lieutenant was driving a jeep in an intoxicated condition in the early morning hours enroute to have breakfast at Miami Beach.

In both of these decisions the Fifth Circuit Court makes it plain that the Government employee must actually be performing a service for the Government at the time of the accident, but the Court finds that in each instance the military person involved was on a mission totally unconnected with any Government service. We feel that in this case where it is clear that the petty officer was enroute to turn in a navel report that an entirely different situation is presented.

II.

THE COURT DID NOT ERR IN FINDING THAT THE NAVAL EMPLOYEE WAS NEGLIGENT.

In this connection the Court should note that the appellee had nothing whatsoever to do with the operation of the vehicle in question, that the vehicle in question was a naval vehicle, and that the road over which the vehicle was moving was a road on the Government-owned naval base on the Island of Guam.

This case then apparently falls squarely under the doctrine of *res ipsa loquitur*. From Johnson's testimony that the vehicle simply began to shimmy and then suddenly turned over, it would seem that an inference of negligence arises and certainly the Gov-

ernment did not dispel this inference by any explanation offered at the trial.

The Federal Courts have long recognized the doctrine of *res ipsa loquitur*, and apparently the Federal decisions are controlling in this case inasmuch as as yet the Courts in Guam have issued no decisions, and the Guam code which is quoted at length in the transcript, would impose no restriction on the doctrine.

In conclusion, it is appellee's belief that viewing all of the circumstances it is apparent that the accident most certainly occurred at a time when the naval vehicle was being driven to the benefit of the United States Government and that most certainly the naval employee involved was performing a reasonable act in properly completing his regular daily duties on behalf of the Government. Appellee respectfully urges this Court to sustain the findings of the District Court.

Dated, Oakland, California,
October 5, 1949.

Respectfully submitted,

SHERIDAN DOWNEY, JR.,

Attorney for Appellee.

No. 12,238

IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

ELMER R. JOHNSON,

Appellee.

APPELLANT'S REPLY BRIEF.

FRANK J. HENNESSY,

United States Attorney,

RUDOLPH J. SCHOLZ,

Assistant United States Attorney,

422 Post Office Building, San Francisco 1, California,

Attorneys for Appellant.

FILED

DEC 9 1949

PAUL P. O'BRIEN, /
CLERK

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IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,	} <i>Appellant,</i>
vs.	
ELMER R. JOHNSON,	

APPELLANT'S REPLY BRIEF.

FURTHER STATEMENT OF THE CASE.

In appellee's statement of the case, he states (p. 2) that it would appear that Moore should have turned in his report some time early on December 22, 1946.

In this we agree. The evidence does not definitely disclose that the report was to be turned in immediately, but the deduction therefrom may be obvious.

Moore was at the Navy Air Base. He was going to the Navy Ammunition Depot to turn in his report (R. 13, 74). He asked appellee if he wanted to ride with him. They went to the Navy Ammunition Depot (R. 72) to do so. This was in line of duty, but Moore did not do so. The Court may take judicial notice that the military forces are not only trained but required to turn in reports promptly, unless anything

to the contrary appears. The military forces are trained for war, and prompt reporting is fundamental in their orders and training. If Moore was not to turn in his report, why did he go there? But the evidence shows he went there to turn in his report. Suppose Moore drove the vehicle on his own business for six months and then turned in his report. Would it still be in the line of duty of turning in his report?

Appellee states (p. 3) that the place where Moore was to deliver his report "was on the route Moore would have to take in order to return directly to the Fifth Service Dispensary at the Ammunition Depot."

Let us see: (1) Moore and appellant were at the Navy Air Base; (2) They went to the Ammunition Depot to deliver the report but did not; (3) They went back to the Air Base so Johnson could cut the hair of about six sailors; (4) They then went to Agana to eat; (5) Moore agreed to drive the sailors and appellee back to their quarters at the Ammunition Depot and the Navy Air Base (R. 63); (6) En route they stopped at the "Brig" on a personal matter, and then proceeded to the Ammunition Depot. En route the accident happened.

If Moore, in the first instance, was on his way to the Ammunition Depot to deliver his report (which it is conceded he was), then the trips as outlined above with the exception of the first, were not on a direct route. If Moore was on government business at Agana, where he took appellee to eat, and was

only on business of the Government—then it may be argued it was on the direct route.

But Moore was where he had no official business to be. The cases cited show that going to meals is not within the scope of employment (pp. 15-16 Appellant's Opening Brief).

Furthermore, if Moore had a duty to deliver a report, he should not have been there. His duty did not require his "wanderings" and to deliver customers to a barber shop or to return appellee to his living quarters. Moore's report could have been delivered in half an hour, yet it appears it was postponed for over seven hours to accommodate his "wanderings."

THE LAW AS TO PROOF.

The United States can be sued only by its consent. This consent must be strictly construed.

United States v. Sherwood, 312 U. S. 584, 590;
Schillinger v. United States, 155 U. S. 163, 166.

The Federal Tort Claims Act does not consent to be sued in all cases where a private person would be liable in tort. The act specifically states it may be sued only when " * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment." Jurisdiction of the Court must be established by the plaintiff before recovery can be had. He is required to establish certain primary facts which are set forth in the act.

No presumption of law, or, of course, inferences can establish this.

Hubsch v. United States, 174 Fed. (2d) 7;
Murphy v. United States, 79 F. Supp. 925;
Fries v. United States, 170 Fed. (2d) 726;
Christian as Administrator v. United States
 (D. C. W. D. Kentucky Sept. 15, 1949);
United States v. Campbell, 172 Fed. (2d) 500;
 Other cases cited in opening brief.

In addition, the burden of proof, under the California law, and perhaps the law of Guam, is on the appellee.

“The plaintiff in order to recover *must* be able to *prove* that the defendant *did some act*, without which the collision would not have occurred * * *.” (Italics ours.)

2 Cal. Jur. 10 Yr. Sup. p. 460 (citing authorities);

Mazgedian v. Swift & Co., 22 C. A. (2d) 570
 71 Pac. (2d) 833.

THE LAW AS TO THE NEGLIGENCE OF GOVERNMENT DRIVER.

Proof would have to be established that the driver knew, or should have known, of the existence of the defects in the vehicle.

2 Cal. Jur. Supp. 234.

Azzaro v. O'Connell, 121 Cal. App. 617-622, 9
 Pac. (2d) 345.

There is no evidence that Moore knew or should have known by the exercise of ordinary care, of the

defects. In fact, it appears otherwise. In view of the above *res ipsa loquitur* could not apply. No cases are cited by appellee to sustain his contention that it does apply. The doctrine of *res ipsa loquitur* is only an inference. The appellee must prove that appellant did some act, or omitted to do something which, if done, would have prevented its occurrence, and that he must demonstrate that appellant was enabled to foresee or know of the danger of his conduct, in order to recover. This appellee has not done. We also do not think that the doctrine of *res ipsa loquitur* applies when the facts raise an issue as to whether the negligence was attributed to the driver or some other person or cause. There being no evidence of the negligence of the driver, the facts raise an issue of negligence, if any, of some other person.

Besides, the apparently unsurmountable obstacle of appellee proving negligence under the law of Guam, the burden of proof being upon him, it appears that under the Federal Tort Claims Act itself, that the appellee can not recover.

It would further appear that the negligence of the appellant has not been established.

Dated, San Francisco, California,
December 5, 1949.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

RUDOLPH J. SCHOLZ,

Assistant United States Attorney,

Attorneys for Appellant.

No. 12,239

IN THE

United States Court of Appeals
For the Ninth Circuit

GEORGE MARION WILFONG,

Appellant,

VS.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

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IN THE

**United States Court of Appeals
For the Ninth Circuit**

GEORGE MARION WILFONG,

Appellant,

VS.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, herein after called "the Court below", denying appellant's petition for writ of habeas corpus. (Tr. 27-29.) At the time the action was brought the Court below had jurisdiction over the habeas corpus proceedings under Title 28 U.S.C.A., Sections 451, 452 and 453, now superseded by Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below denying the petition is now conferred upon this honorable Court by Title 28 U.S.C.A., Section 2253, but, prior to September 1, 1948, such jurisdiction was conferred by Title 28 U.S.C.A., Sections 463 and 225.

STATEMENT OF THE CASE.

The appellant, an inmate of the United States Penitentiary, at Alcatraz, California, filed a petition for writ of habeas corpus (Tr. 2-6), and the Court below issued an order to show cause (Tr. 10). Thereafter the appellee filed a return to order to show cause (Tr. 11-26). The matter was then submitted and the Court below filed the following written order denying petition for writ of habeas corpus:

“I am convinced, from a study of the documents on file herein, consisting of the Petition for Writ of Habeas Corpus, the Order to Show Cause, and the Return to Order to Show Cause, and attached Exhibits, that the petitioner has failed to state a cause of action. This is the second Petition for Writ of Habeas Corpus filed herein by the petitioner; the first case being numbered 23176-G. In this case, the writ issued, and after hearing, United States District Judge Louis E. Goodman found that the conviction and sentence of the petitioner before the United States District Court for the Western District of Michigan was valid, and discharged the writ. On appeal from this Order Discharging the Writ, the Court of Appeals for the Ninth Circuit found that the conviction was valid but that the sentence was void, because it was imposed in the absence of petitioner's counsel. See *Wilfong v. Johnston*, 156 Fed. (2d) 507. Thereafter, pursuant to the mandate of the Court of Appeals for the Ninth Circuit, Judge Goodman remanded the petitioner to the jurisdiction of the trial court for judgment and sentence upon the verdict of guilty heretofore returned against him. Petitioner moved for a new

trial, and the motion was denied. Thereafter he was resentenced, and from the order of resentence petitioner appealed to the United States Court of Appeals for the Sixth Circuit. On appeal, the order of the trial court was affirmed. See 162 Fed. (2d) 718, certiorari denied, 333 U.S. 846; rehearing denied, 333 U.S. 878.

“The gravamen of petitioner’s basic complaint, in our case at bar, is that the trial court lost jurisdiction to impose a new sentence, but this contention was disposed of adversely to petitioner by our Circuit Court of Appeals in its decision in *Wilfong v. Johnston*, supra. Petitioner’s additional complaint that the trial court failed to listen to oral argument in support of his motion for a new trial is not a ground cognizable in habeas corpus. Another contention advanced by the petitioner herein is, that habeas corpus should lie because the order of resentence did not comply with Rule 32 (b) of the Federal Rules of Criminal Procedure, which provide, in pertinent part, as follows:

‘A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. * * *’

“This contention is likewise without merit because when the order of resentence is read, together with the judgment first entered, there can be no question that the items of information required by the rule are set forth. See *Sanders v. Johnston* (C.C.A. 9), 165 Fed. (2d) 736, 737.

“Petitioner further contends that he was unconstitutionally denied the opportunity to make a motion for new trial within three days after ver-

dict (as required by the Federal Rules in effect at that time) because judgment was pronounced in the absence of his counsel, with the result that his motion made subsequently could not be heard by the trial judge, who was then deceased. After petitioner was remanded to the trial court for judgment and sentence, Judge Picard, sitting in place of the deceased trial judge, expressed some doubt as to his jurisdiction to entertain a motion for new trial but assuming jurisdiction, nevertheless, denied the motion, with prejudice. The record discloses that Judge Picard had the complete trial record before him. When a trial has been reported stenographically so that a record is preserved there can be no question of the power of the trial judge's successor to rule on a motion for new trial. See *Meldrum v. United States* (C.C.A. 9), 151 Fed. 177, 182.

“Finally, it should be noted that in all the proceedings, after the petitioner was remanded to the trial court, he was represented by counsel, and that on appeal to the Court of Appeals for the Sixth Circuit this counsel likewise represented him and presented substantially the same contentions advanced in the instant application.

“In view of the foregoing, It Is Hereby Ordered that the Petition for Writ of Habeas Corpus be, and the same is, Dismissed, and the Order to Show Cause be, and the same is, Discharged.

Dated: March 23rd, 1949.

Michael J. Roche,
United States District Judge.”

(Tr. 27-29.)

From this latter order appellant now appeals to this honorable Court. (Tr. 30-31.)

QUESTION.

Was the appellant entitled to his discharge from the custody of the appellee?

CONTENTION OF APPELLEE.

The answer to the above stated question is "No".

ARGUMENT.

The facts of this case and the contentions of appellant are clearly set forth in the order of the Court below denying petition for writ of habeas corpus and, accordingly, need no amplification by the appellee. The reasoning of the Court below in its order, and the authorities cited therein, are a complete answer to the contentions of the appellant. Appellee, therefore, adopts them *in toto* as his argument on this appeal.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the order of the Court below, in denying

/

petition for writ of habeas corpus, is correct and should be affirmed.

Dated, San Francisco, California,
July 12, 1949.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellee.

No. 12242

United States
Court of Appeals
For the Ninth Circuit.

OVE FOG,

Appellant,

vs.

R. C. WILLIAMS & CO., INC., a Corporation,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED
AUG - 5 1949

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

PAUL P. O'BRIEN,
CLERK

No. 12242

United States
Court of Appeals
For the Ninth Circuit.

OVE FOG,

Appellant,

vs.

R. C. WILLIAMS & CO., INC., a Corporation,
Appellee.

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for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Defendant and Appellee.

On appeal from the United States District Court
for the Northern District of California, Southern
Division.

Trial before the Honorable Louis E. Goodman,
District Judge, sitting without a jury.

In the District Court of the United States for the
Northern District of California, Southern
Division

Civil No. 28121G

OVE FOG,

Plaintiff,

vs.

R. C. WILLIAMS & CO., INC., a Corporation,
Defendant.

COMPLAINT FOR CANCELLATION OF
AGREEMENT ON GROUND OF FRAUD
AND FOR MONEY DUE

I.

Defendant R. C. Williams & Co., Inc., is a corporation duly incorporated under the laws of the State of New York with its principal place of business in the City of New York, State of New York.

II.

Plaintiff Ove Fog is a resident of the City and County of San Francisco, State of California.

III.

That the amount in controversy between the parties in this action, and for which plaintiff seeks judgment, exceeds the sum of \$3000.00.

IV.

Defendant corporation now is and at all times herein mentioned was engaged in the business of

importing and merchandising of wines, spirits and liquors, which merchandise was sold by defendant throughout the several states and territories of the United States. In the conduct of its liquor business defendant corporation at times operated under the designation "Continental Import Division of R. C. Williams & Co., Inc.," and at other times under the designation of "Williams Importers, a Division of R. C. Williams & Co., Inc."

V.

On or about May, 1942, plaintiff was appointed by defendant as manager of the western branch of the liquor division of defendant corporation for the sale and distribution of the various wines, spirits and imported liquors handled by or dealt in by defendant. Western headquarters for such purpose was established at 149 California Street, San Francisco, California. All licenses required for conducting the importation, sale and distribution of liquors throughout said western division of defendant corporation were taken in the name of R. C. Williams & Co., Inc. The territory assigned to plaintiff as manager of said western division comprised the states of California, Nevada, Arizona, Washington, Oregon, Utah, Idaho, Montana, Wyoming, New Mexico and the Territories of Hawaii and Alaska.

VI.

Plaintiff's compensation for services to be rendered as manager for said western division, and which compensation defendant agreed to pay, was

on the basis of a minimum fee plus a commission on all wines, spirits and liquors sold and delivered by defendant throughout the area comprising the western division so assigned to plaintiff, said commission to be computed as follows:—10c per case for the first 5000 cases; 15c per case for from 5000 to 10,000 cases; 20c per case for from 10,000 to 15,000 cases; 25c per case for over 15,000 cases.

VII.

That in the latter part of 1944 and throughout 1945 and 1946, defendant corporation imported into and sold and caused to be delivered to wholesale liquor dealers in the state of California, Nevada, and Arizona and the Territory of Hawaii 405115 cases of Harwood's Blended Canadian Whisky. In addition to the quantity of Harwood's Whisky so imported and sold in the states of California, Nevada and Arizona and the Territory of Hawaii defendant corporation imported and sold many thousands of cases of said Harwood's whisky in the remaining states and the Territory of Alaska comprising said western area assigned to plaintiff. Plaintiff does not at this time know the exact amount thereof so imported and sold in the said remaining area but according to his information and belief the amount of said Harwood's whisky so imported and sold in the remaining area during said period exceeded 250,000 cases.

VIII.

For a period of more than one year prior to March 8, 1946, a controversy pended between plain-

tiff and defendant corporation over the question of the payment of commissions to plaintiff, at the rates per case above stated, for Harwood's whisky imported and sold by defendant corporation in the western division area assigned to plaintiff as above specified. Defendant corporation falsely and fraudulently and for the purpose of deceiving and misleading plaintiff represented and maintained that defendant corporation had nothing to do with the importation or sale of said Harwood's whisky in the said western division area; and denied that it had demanded or received any commissions on sales of such whisky so imported and sold in said area. Plaintiff was misled by such false and fraudulent representations and did not at that time know the representations so made were false and untrue.

IX.

On or about March 8, 1946, defendant corporation and after repeated statements made by it over a period of several months that defendant had not and was not handling the importation into or sale of Harwood's whisky in the said western division assigned to plaintiff, and was not receiving any compensation for the sale of such whisky in said area, offered to pay plaintiff the sum of \$10,000.00 in full settlement of plaintiff's claim that he was entitled to commissions at the rates per case referred to above on the sales of Harwood's whisky sold and delivered by or through defendant corporation in said western division area. Plaintiff relying on the truthfulness of the false and untrue statements and rep-

representations so made to him by defendant regarding the sale and distribution of Harwood's whisky accepted the offer of settlement so made to him, and defendant did thereupon pay to plaintiff the sum of \$10,000.00. That plaintiff would never have agreed to the settlement so offered by defendant nor would he have accepted the sum of \$10,000.00 paid him by way of settlement of his claim for commissions on the sale of Harwood's whisky if he had not believed the representations made to him by defendant that defendant corporation had nothing to do with the sale and distribution of Harwood's whisky in the said western division area were true and honestly made.

X.

Plaintiff continued to act as manager of the said western division area of defendant corporation under the same terms of employment as were agreed to when he was first employed as such manager in May of 1942. On December 31, 1946, plaintiff and defendant entered into a written contract of employment upon a new and different basis for the sale of certain specified classes of wines and liquors to be sold throughout the western division area referred to above. On April 30, 1947, plaintiff, at the request of defendant, agreed to the cancellation of said written agreement of employment of December 31, 1946, and resigned as manager of the western division area.

XI.

Plaintiff never discovered that the statements and representations made to him by defendant to the

effect that defendant corporation had nothing to do with the sale and distribution of Harwood's whisky in the said western division area, and that it had not demanded or received any commissions or compensation for sales of such whisky so imported and sold, were false and untrue until the latter part of the month of January, 1948, when he was summoned to appear and to testify and produce all correspondence then in his possession relating to the sale of Harwood's Blended Canadian Whisky at a hearing held in San Francisco before a special investigator of the Bureau of Internal Revenue. Knowledge gained by plaintiff as a result of his appearance before the special investigator established the fact that the said statements and representations made to him by defendant corporation were false and untrue.

XII

There is now due, owing and unpaid to plaintiff from defendant commissions on the sale and distribution of the said 405115 cases of Harwood's Blended Canadian Whisky in the states of California, Nevada, Arizona and the Territory of Hawaii, as above recited, the sum of \$91,278.75 after deducting from the full amount of the commissions that became due plaintiff based on the sale and distribution of said 405115 cases of Harwood whisky the sum of \$10,000.00 heretofore paid to plaintiff as alleged in paragraph IX herein; and there is also now due, owing and unpaid to plaintiff from defendant additional commissions computed on the basis of 25c per case for all of said Harwood whisky sold

and distributed in the remaining states and Territory of Alaska of said western division area as alleged in paragraph VI hereof, the exact amount of which is at this time unknown to plaintiff. That no part of said amounts so alleged to be due, owing and unpaid to plaintiff has been paid by defendant or by any person on its behalf.

Wherefore, plaintiff prays judgment against defendant as follows:

1. That the purported settlement between plaintiff and defendant as set forth above be adjudged fraudulent and of no effect.

2. That an accounting be had between plaintiff and defendant to ascertain and determine the exact amount thereof due and unpaid from defendant to plaintiff.

3. For the sum of \$91,278.75 due plaintiff for commission on the sale and distribution of Harwood whisky in the states of California, Nevada and Arizona and the Territory of Hawaii.

4. For the amount of commissions payable to plaintiff on the sale and distribution of Harwood whisky in the states of Washington, Oregon, Utah, Idaho, Montana, Wyoming, New Mexico and the Territory of Alaska during the years 1944, 1945 and 1946, when the quantity thereof has been determined, computed on the basis of 25c per case so sold and distributed.

5. For interest on the sums found due plaintiff and for plaintiff's costs of action.

6. For such other and further relief which to the court seems meet and proper in the premises.

/s/ RICHARD TUM SUDEN,
Attorney for Plaintiff.

State of California,
City and County of San Francisco—ss.

Ove Fog, being first duly sworn, deposes and says: That he is the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters that are therein stated on his information or belief and as to those matters he believes it to be true.

/s/ OVE FOG.

Subscribed and sworn to before me this 13th day of April, 1948.

[Seal] RUTH NATUSCH,
Notary Public in and for the City and County of
San Francisco, State of California. My Com-
mission Expires January 3, 1951.

[Filed]: June 11, 1948.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now Defendant R. C. Williams & Co., Inc., a corporation, and answering the Complaint of Plaintiff is the above-entitled cause, denies, admits and alleges as follows:

FIRST DEFENSE

The Complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

Admits the allegations of Paragraphs I, II and III of said Complaint.

Answering Paragraph IV.

Admits Defendant at all times mentioned in the Complaint of Plaintiff, was engaged in the business of merchandising of wines, spirits and liquors, which merchandise was sold by defendant throughout the several states and territories of the United States; but in this connection defendant alleges that it was at all times mentioned, engaged in the business of importing and merchandising foods and groceries as well as wines, spirits and liquors. Denies the allegations contained in the last sentence of paragraph IV and in that connection alleges that defendant corporation conducts its business under its own name, with headquarters at 265 - 10th Avenue, in the City of New York, State of New York, and as a part of the said business conducted through said office it has imported and sold liquor throughout the

United States and the territories of United States. Prior to any of the times referred to in the Complaint of Plaintiff, Defendant opened up a separate division for European imports and other products, with its headquarters at 610 - 5th Avenue in the City of New York, State of New York. Said division up to on or about March 1, 1945, was conducted under the name and style of

“Continental Import Division,
of R. C. Williams & Co., Inc.”

On or about said March 1, 1945, the name of said division was changed to

“Williams Importers,
A Division of R. C. Williams & Co., Inc.”

The said division conducted business throughout the United States and in the territories of the United States. All of its business was entirely independent of the business conducted by Defendant at 265 - 10th Avenue, New York City; it was under separate management, maintained separate offices and separate accounts and in all respects was a business independent from defendant corporation, save and except that the defendant corporation was the owner thereof.

Answering Paragraph V.

Denies each and every allegation contained in said paragraph, save and except those portions hereinafter admitted, and in this connection alleges that:

Plaintiff, on or about May, 1942, was appointed by Defendant as Manager of the Western Division of said “Continental Import Division.” The said

Western Division covered the States of California, Nevada, Arizona, Washington, Oregon, Utah, Idaho, Montana, Wyoming, New Mexico and territories of Hawaii and Alaska. The headquarters of said Western Division were and are in the City and County of San Francisco, State of California. At said times the said Western Division of said "Continental Import Division" sold and delivered throughout said western territory, various liqueurs, rums, cordials, champagnes and wines.

All licenses required for conducting the importation, sale, and distribution of the above-named products through said "Continental Import Division" were and are in the name of defendant corporation, but in this connection defendant alleges that the license issued in the name of the defendant corporation for the business conducted from 265 - 10th Avenue, New York, is an entirely separate and distinct license from that issued to it for the business conducted by said "Continental Import Division" at 610 - 5th Avenue, in the City of New York.

On or about December 31, 1946, plaintiff entered into a contract in writing with said "Williams Importers," a copy of which agreement is attached hereto, made a part hereof and marked Exhibit "A."

Answering Paragraph VI.

Denies that plaintiff's compensation was for services to be rendered by him as Manager of the Western Branch of the liquor division of defendant corporation, but in this connection alleges that the com-

pensation he was to receive under his contract was for services to be rendered by him as Manager of said "Continental Import Division." Admits that defendant agreed to pay to plaintiff a compensation based upon the business to be done for said "Continental Import Division," and that said compensation provided for a minimum fee plus a commission on all goods sold by said "Continental Import Division," throughout said western area as follows: 10c per case for the first 5000 cases; 15c per case for from 5000 to 10,000 cases; 20c per case for from 10,000 to 15,000 cases; 25c per case for over 15,000 cases.

Answering Paragraph VII.

Admits the allegations contained in the first sentence of said paragraph. Denies the allegations contained in the remainder of said paragraph and in this connection alleges that the defendant corporation did not sell in excess of 96,592 cases of Harwood Blended Canadian Whiskey in the States other than California, Nevada and Arizona and in the territory of Alaska.

Answering Paragraph VIII.

Admits that for more than a year prior to March 8, 1946, a controversy pended between plaintiff and defendant over the question of payment of commissions to plaintiff at the rates per case set out in paragraph VI of plaintiff's complaint covering Harwood Whiskey imported and sold by defendant corporation in the area covered in plaintiff's said assigned area, but in this connection defendant alleges that said whiskey was not sold by plain-

tiff or through said "Continental Import Division" or said "Williams Importers."

Denies each and every allegation contained in the last two sentences of Paragraph VIII and in this connection denies that defendant represented or maintained that it had nothing to do with the importation or sale of Harwood's whiskey in said area and denies that defendant denied to plaintiff that it had demanded or received any commissions on sales of such whiskey so imported and sold in said area. In this connection defendant alleges that it did import and sell throughout said area Harwood Whiskey and did receive a profit on the sale thereof, but that said sales were made by that portion of defendant's business conducted at 265 - 10th Avenue in the said City of New York, and that no part of said business was conducted by or through said "Continental Import Division" or said "Williams Importers," which said division of R. C. Williams & Co., employed plaintiff as its western Manager.

Defendant further alleges that plaintiff at all times knew that defendant was importing and selling Harwood Whiskey throughout said western territory and that as manager of said "Continental Import Division" and said "Williams Importers" he knew that said whiskey was not being imported or sold or distributed by the said division of defendant corporation.

Answering Paragraph IX.

Denies every allegation contained in said paragraph, save and except as follows:

Admits that prior to March 8, 1946, Plaintiff was not receiving any compensation for the sale of Harwood Whiskey in said area. Admits that defendant paid plaintiff \$10,000.00 in full settlement of plaintiff's claim that he was entitled to commissions at the rates per case referred to in paragraph VI of said Complaint, on sales of Harwood Whiskey sold and delivered by or through said defendant in said area. Alleges that Plaintiff at all times knew of all of the facts relating to said dispute between plaintiff and defendant.

Answering Paragraph X.

Admits all of the allegations of said paragraph, save and except the allegation that the contract of December 31, 1946, was upon a new and different basis; and in this connection defendant alleges that the said contract of December 31, 1946, so referred to in said paragraph is the contract, a copy of which is attached hereto as Exhibit "A."

THIRD DEFENSE

Alleges that if there was any obligation owing from defendant to plaintiff because of the distribution of said whiskey in said western area, said obligation was extinguished by the said settlement arrived at between plaintiff and defendant on or about March 8, 1946, in which defendant paid and plaintiff accepted the sum of \$10,000.00 in full satisfaction and extinction of said claim. The said settlement agreement was in writing and a copy thereof is attached hereto, made a part hereof and marked Exhibit "B."

FOURTH DEFENSE

Said claim of plaintiff against defendant and every portion thereof is barred by the provisions of Section 339, Subdivision (1), Code of Civil Procedure of the State of California.

Wherefore, defendant prays that plaintiff take nothing by his action and that it may go hence with its costs.

JULES JACOB,
By JAMES FARRAHER.

SULLIVAN, ROCHE,
JOHNSON & FARRAHER.
By JAMES FARRAHER,
Attorneys for Defendant.

Receipt of a copy of the foregoing is hereby admitted this 27th day of July, 1948.

/s/ RICHARD TUM SUDEN,
Attorney for Plaintiff.

[Endorsed]: Filed July 28, 1948.

EXHIBIT A

Telephone Columbus 5-0422
Cable Address: Ortavaud, N. Y.

Williams Importers
A Division of R. C. Williams & Co., Inc.
Wine and Spirit Merchants

610 Fifth Avenue
New York 20, N. Y.

Jean Ravaud
General Manager
N.Y.S. License L.L. 64

December 31, 1946.

Mr. Ove Fog
Williams Importers
A Division of R. C. Williams & Co., Inc.
Western Division Office
149 California Street
San Francisco 11, California

Dear Mr. Fog:

This is to confirm our agreement concerning the terms of your employment as Manager of the Western Division of Williams Importers, a Division of R. C. Williams & Co., Inc.

Any and all previous agreements for your employment by us for any period subsequent to the date hereof are terminated and cancelled.

The term of your employment hereunder shall

commence January 1, 1947, and terminate December 31, 1947. This agreement shall be automatically renewable from year to year unless either party notifies the other by registered mail 60 days prior to the termination of any yearly period of his or its intention not to renew said agreement.

You are to receive a commission of 25 cents per case upon the following products sold and delivered in your territory:

Grand Marnier Cordon Rouge Liqueur—Metaxa Greek Specialties—Corgo Brandy & Port Wines—Lozeron Swiss Wines—Diez Hermanos Sherries—Havana Club Cuban Rums—Havana Club Puerto Rican Rums—Bardinet Cordials—Bardinet Specialties—G. H. Mumm Champagnes—Domaines Dopff Alsatian Wines—F. Chauvenet Wines.

In any event you are to receive on account of the aforesaid commissions a “minimum commission” of \$18,000.00 per annum payable in equal semi-monthly installments of \$750.00 each on the 15th and last day of each month. Any commissions earned by you in excess of said “minimum commissions” in the sum of \$18,000.00 shall be paid to you within 30 days after the last day of the year.

Commissions statements are to be rendered monthly.

Commissions on returned merchandise will be charged back against your commission account.

On any additional products that may be handled by this Division for sale in your territory, in the event that the commission fixed by us is less than 25

cents per case and you do not agree to such lesser amount, the amount of commission on such new item is then to be determined by arbitration pursuant to the Arbitration Law of the State of New York and under the rules of the American Arbitration Society in such cases made and provided.

Your territory consists of the following:

California, Oregon, Washington, Wyoming, Utah, Nevada, New Mexico, Montana, Arizona, Idaho, Alaska, Hawaii.

Williams Importers reserves the right to determine the quantities of any of its products to be allocated for sale in your territory.

All orders for the sale of merchandise shall be subject to the approval of the Credit Department of the New York Office.

Your duties, generally, subject always to the direction and control of our New York Office, shall consist of the following:

To supervise and be responsible for the proper operation of our Western Office.

To employ all necessary personnel after first obtaining the approval of the New York office.

To sell and supervise sales and do all the necessary travelling in connection with same.

Appointment of new or any change of present distributors shall be made by you only with the consent of the New York office.

You are to render an itemized expense account monthly covering all reasonable business expenses.

You are to devote your full and exclusive time and effort to the conduct of our business.

Very truly yours,

WILLIAMS IMPORTERS.
/s/ JEAN RAVAUD,
General Manager.

Accepted and approved:
/s/OVE FOG.

EXHIBIT B

March 8, 1946.

Mr. Ove Fog:

This will confirm our oral agreement of this week, to the effect that while we do not recognize any claim for any commissions on Harwood Whiskey sales in your territory, having previously advised you that Williams Importers has nothing to do with this product, we, in order to obviate any disagreement between us, will pay you the sum of \$10,000. in full and final settlement of all claims which you have made and claims you might assert in the future on the sales of Harwood Whiskey in your territory, as long as this product is not directly handled by the Williams Importers Division.

Will you please sign the original and duplicate signifying your acceptance and return same to us?

Upon receipt of the duplicate and original, your

copy signed by us will be forwarded to you together with our check.

WILLIAMS IMPORTERS.

/s/ JEAN RAVAUD,

General Manager.

Accepted and Approved:

By /s/ OVE FOG.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled cause came on regularly before me on Tuesday, December 28, 1948, a Jury having been waived. Plaintiff appeared by his attorney, Richard tum Suden, and the defendant corporation appeared by Jules Jacobs, and by James Farraher representing the law firm of Sullivan, Roche, Johnson & Farraher. The plaintiff placed before the Court his evidence, both oral and documentary, and having completed the presentation of his evidence, rested his case. Thereupon defendant corporation, by its counsel on Wednesday, December 29th, without waiving its right to offer evidence in the event its motion should not be granted, moved for dismissal of said action under Rule 41 (b) of the Rules of Civil Procedure upon the ground that upon the facts and the law the plaintiff had shown no right to relief.

The said motion was argued by the Counsel for

each party and after giving consideration to the evidence introduced by plaintiff and the argument of Counsel, I hereby grant said motion upon the grounds stated and find as follows:

FINDINGS OF FACT

I.

The allegations of paragraphs I, II and III of Plaintiff's Complaint are and each of them is true.

II.

The defendant corporation at all times herein mentioned was engaged in the business of importing and merchandising of wines, spirits and liquors and other merchandise with its principal office at 265 Tenth Avenue, City of New York, State of New York. During all of the times referred to in the complaint of plaintiff, defendant corporation maintained a division for the importing and merchandising of wines, spirits, liquors and other merchandise, other than whiskey, throughout the several states and territories of the United States. At all times referred to in the complaint of plaintiff, said division had its principal place of business at 610 Fifth Avenue, City of New York, State of New York, and conducted its business separate and apart from that conducted by defendant corporation at 265 Tenth Avenue, said city. In May, 1942, the said division operated under the designation of "Continental Import Division of R. C. Williams & Co., Inc.," which name was thereafter changed to

“Williams Importers, a Division of R. C. Williams & Co., Inc.”

On or about May, 1942, plaintiff was appointed by the said “Continental Import Division of R. C. Williams & Co., Inc.,” as Manager of its Western Branch for the sale and distribution of wines, spirits and imported liquors handled or to be handled by said division, with the headquarters of said branch established in the City and County of San Francisco, State of California. The territory assigned to said Western Division, of which plaintiff was appointed Manager, consisted of the States of California, Nevada, Arizona, Washington, Oregon, Utah, Idaho, Montana, Wyoming, New Mexico and the Territories of Hawaii and Alaska.

The terms of the said employment of plaintiff were agreed upon orally between plaintiff and the manager of said division of defendant corporation, and provided that in addition to his salary, plaintiff should receive a yearly commission or bonus of 10c per case for the first 5000 cases of wines, spirits or liquors sold by said division; 15c per case for from 5000 to 10,000 cases so sold; 20c per case for from 10,000 to 15,000 cases and 25c per case for every case over 15,000 cases.

III.

On or about April 8, 1944, defendant R. C. Williams & Co., Inc., operating from its office at 265 Tenth Avenue, New York City, New York, entered into a written agreement with Distillers Agency, Inc., representing the Canadian Distillery which

manufactures Harwood's Whiskey, wherein R. C. Williams & Co., Inc., was designated exclusive agent to distribute Harwood's Whiskey in United States of America, and wherein it was agreed that upon sales outside Metropolitan New York "as and for commissions, allowances and remunerations for its efforts and services," Defendant R. C. Williams & Co., Inc., was to purchase said whiskey at \$19.05 per case, f.o.b. Vancouver, British Columbia, and to sell the same f.o.b. Vancouver, Canada, at \$20.77 per case, of which 12c represented the cost of "strip stamps," leaving a gross profit to said defendant of \$1.60 a case in all parts of the United States, save and except the State of New York, subject to a contract entered into on or about April 20, 1944, between said defendant corporation and said Distillers Agency, Inc., which required said defendant corporation, out of said gross profit of \$1.60 per case to pay a brokerage or selling commission of not in excess of 60c per case to brokers or selling agents selected by it, but approved in writing by said Distillers Agency, Inc. Said contract of April 20th, 1944, gave to the said Distillers Agency, Inc., the right to refuse to sell to any customer from whom defendant corporation might receive an order for said whiskey. Pursuant to said contract of April 18, 1944, and said contract of April 20, 1944, defendant corporation, operating from its said office at 265 Tenth Avenue in New York City, State of New York, accepted orders for 405,150 cases of said Harwood's Whiskey from wholesale liquor dealers in

the States of California, Nevada, Arizona and the Territory of Hawaii, and accepted orders for 96,592 cases of said whiskey from wholesalers for the States of Washington, Oregon, Utah, Idaho, Montana, Wyoming, New Mexico and the Territory of Alaska. Said whiskey so ordered by said wholesalers was shipped direct to said wholesalers in the said respective states and territories from the said Distillery at Vancouver, Canada, and the invoices therefor were made up and mailed out by defendant corporation from its said office at 265 Tenth Avenue, New York City, State of New York. Each of the bottles of Harwood's Whiskey so shipped into said states and territories bore on its label, the words "Imported by R. C. Williams & Co., Inc."

IV.

In the Fall of 1944, at about the time the shipments of Harwood's Whiskey into said states and territories were commenced, plaintiff discovered said fact and observed that the labels on the bottles of said whiskey carried the words "Imported by R. C. Williams & Co., Inc.," and he immediately protested the distribution of said whiskey in the states and territories assigned to him in his contract with said "Continental Import Division," which was later known as "Williams Importers," without the said distribution going through the said Continental Import Division or Williams Importers, and he demanded of defendant corporation a commission on the sales of Harwood's Whiskey shipped into his said territory. Defendant corporation, through its

officers, advised him that he was not entitled to any commissions on said whiskey. The dispute between plaintiff and the officers of defendant corporation with reference to plaintiff's claim for said commission was continued from the Fall of 1944 until March 8, 1946, in the form of exchanges of letters and oral conversations. During the exchange of letters between plaintiff and the officers of defendant corporation with reference to said claim, Plaintiff was advised by his superior officers that the only money defendant corporation made or was making out of the sale of said Harwood's Whiskey in the said territory claimed by plaintiff was \$1.00 per case. Plaintiff offered no evidence to show that this advice was not correct and true. At all times during said exchange of correspondence, and said oral conversations, plaintiff knew that defendant corporation was making \$1.00 a case profit on the whiskey shipped into said territory; that any sales of said whiskey in said territory had to "clear" through defendant corporation and that the invoices for the sales of said whiskey were issued from the office of defendant corporation at 265 Tenth Avenue, New York City, State of New York.

V.

The division of defendant corporation by which plaintiff was employed, which as hereinabove stated, was called for a time "Continental Import Division," and then was changed to "Williams Importers," did not during any of the period involved in this action have anything to do with the importa-

tion into or sale of Harwood's Whiskey in the said territory assigned plaintiff, which fact plaintiff well knew. It is not true as alleged in paragraph VIII of plaintiff's complaint that defendant corporation "falsely and fraudulently and for the purpose of deceiving and misleading plaintiff represented and maintained that defendant corporation had nothing to do with the importation or sale of Harwood's Whiskey in the said western division area," but the contrary is true, namely, that throughout said period plaintiff was advised that defendant corporation did take part in the importation and sale of Harwood's Whiskey in the said territory assigned to plaintiff. It is untrue as alleged in said paragraph of said complaint of plaintiff that defendant corporation "denied that it demanded or received any commissions on sales of such whiskey so imported or sold in said area."

VI.

In the Fall of 1945, plaintiff agreed with Hugo Jaburg, President of defendant corporation, that the claim of plaintiff should be arbitrated before the Arbitration Board of the State of New York. The trial of said arbitration was delayed for some time through the absence of certain officers of defendant corporation, and on or about January, 1946, plaintiff in writing advised the officers of defendant corporation that through advice of his counsel he had determined that it would be to his interest to have his claim passed upon by a Court of the United States, rather than by a Board of Arbitration.

VII.

Thereafter and on or shortly prior to the 8th day of March, 1946, plaintiff met with the officers of defendant corporation for the purpose of making an effort to settle the pending dispute between them as to the claim of plaintiff that he was entitled to a commission on the said shipments of Harwood's Whiskey into his said territory.

VIII.

At the time of said negotiations for settlement on, and for many months prior to, March 8th, 1946, plaintiff knew that Harwood's Whiskey was being shipped directly into his said territory and that the orders therefor were received by defendant corporation and by it relayed to the said Distillery, and that the invoices thereon were issued out of the office of defendant corporation at 265 Tenth Avenue in New York City and he knew that defendant corporation was making a profit of \$1.00 upon each case so shipped into his said territory.

IX.

On or about said March 8th, plaintiff and the officers of defendant corporation met and negotiated a settlement of said claim of plaintiff to a commission on the sales of said whiskey, and defendant corporation agreed to pay the sum of \$10,000.00 to plaintiff in full satisfaction and final settlement of his claim, and of any claim that he might assert in the future to a commission on sales of Harwood's Whiskey in his territory as long as the

said whiskey was not thereafter directly handled by Williams Importers, the division under which he was employed. The said sum of \$10,000 was suggested by plaintiff. Thereafter plaintiff was paid said sum of \$10,000.00 by defendant corporation in full and final settlement of his said claim and plaintiff accepted the same as a full and final settlement of his said claim by signing a document dated March 8, 1946, a copy of which is attached to the Answer of Defendant Corporation herein as Exhibit "B" thereof, and simultaneously plaintiff entered into a new agreement in writing with said Williams Importers, whereby his right to commission was limited to the sales of certain liqueurs, brandies, wines, rums, cordials and champagnes, and to any additional products that might be handled by Williams Importers, the division by which plaintiff was employed.

X.

Prior to the making of said settlement, plaintiff had the advice of his attorney with reference to his claim. No fraud was practiced upon him by defendant corporation or any of its officers and no misrepresentations were made by them to him and he therefore was not induced to enter into said settlement by any fraud or misrepresentation on the part of defendant corporation or any of its officers. Any claim plaintiff had for commissions on the sales of said whiskey was merged in and fully satisfied by said settlement.

XI.

The allegations contained in paragraph XI of plaintiff's complaint are untrue, save and except the allegation that he was summoned to appear and testify and produce all correspondence then in his possession relating to the sale of Harwood's Whiskey at a hearing held in San Francisco before a Special Investigator of the Bureau of Internal Revenue.

XII.

There is not due from defendant corporation to plaintiff any commission on the sale or distribution of Harwood's Whiskey in the said territory claimed by plaintiff.

XIII.

Plaintiff on the presentation of his evidence failed to establish any right to recover anything from defendant corporation, in that upon the facts established by the evidence offered, and upon the law, plaintiff has shown no right to any relief.

From the foregoing facts I draw the following

CONCLUSIONS OF LAW

I.

Plaintiff is not entitled to judgment against defendant corporation in any sum whatsoever.

II.

Defendant corporation is entitled to judgment against plaintiff for its costs incurred in this action.

III.

The motion of defendant corporation to dismiss

this action under Rule 41 (b) of the Rules of Civil Procedure on the ground that upon the facts and the law, plaintiff has shown no right to relief, has been properly granted.

IV.

Judgment should and shall be entered in favor of defendant corporation and against plaintiff for the costs incurred by it, in this action.

Dated January 4th, 1949.

/s/ LOUIS GOODMAN,

Judge of the Above-Entitled
Court.

Receipt of a copy of the foregoing is hereby admitted this 4th day of January, 1949.

/s/ RICHARD TUM SUDEN,

Attorney for Plaintiff.

The amendments proposed by plaintiff to the above findings I find to be not meritorious and I have disallowed them.

Jan. 14, 1949.

/s/ GOODMAN,

District Judge.

[Endorsed]: Filed Jan. 14, 1949.

In the District Court of the United States for the
Northern District of California, Southern
Division

Civil No. 28121G

OVE FOG,

Plaintiff,

vs.

R. C. WILLIAMS & CO., INC., a Corporation,
Defendant.

JUDGMENT

The above-entitled cause having come on regularly before me, sitting without a jury, on the 28th day of December, 1948, and plaintiff having presented his evidence and rested his case; and Defendant Corporation having moved for a dismissal of said action under the authority of Rule 41 (b) of the Rules of Civil Procedure, and said motion having been granted by me,

And Findings of Fact and Conclusions of Law having been signed and filed;

Now, Therefore, it is adjudged that:

(1) Plaintiff take nothing by his said action, and that

(2) Defendant recover of plaintiff its costs and disbursements, in the sum of \$.

Dated January 19th, 1949.

/s/ LOUIS GOODMAN,

Judge of the Above-Entitled
Court.

Entered in Civil Docket Jan. 20, 1949.

Receipt of a copy of the foregoing is hereby admitted this 5th day of January, 1949.

/s/ RICHARD TUM SUDEN,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 19, 1949.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL AND NOTICE
OF MOTION FOR A NEW TRIAL

To the Honorable Louis E. Goodman, Judge of Said
United States District Court, and to Messrs.
Jules Jacobs, Sullivan, Roche, Johnson & Far-
raher, Attorneys for Defendant.

Please Take Notice that Ove Fog, the plaintiff herein, intends to and does hereby move said court to vacate and set aside the judgment of this court heretofore rendered in favor of the defendant and against plaintiff, in the above-entitled action and to grant plaintiff herein a new trial herein.

Said motion will be made upon the minutes of said court and all the papers and pleadings on file herein.

Dated this 31st day of January, 1949.

/s/ RICHARD TUM SUDEN,
Attorney for Plaintiff.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR A NEW TRIAL

To R. C. Williams & Co., Inc., Defendant Above
Named, and to Messrs. Jules Jacobs, Sullivan,
Roche, Johnson & Farragher, Its Attorneys:

Please Take Notice that the undersigned will
bring the above motion on for hearing before this
court at Room 258, United States Courts and Post
Office Building, City and County of San Francisco,
State of California, on the 7th day of February,
1949, at 10:00 o'clock in the forenoon of that day
or as soon thereafter as counsel may be heard.

/s/ RICHARD TUM SUDEN,
Attorney for Plaintiff,
605 Market Street, San
Francisco.

Receipt of a copy of the foregoing Notice of Mo-
tion is hereby admitted this 31st day of January,
1949.

SULLIVAN, ROCHE,
JOHNSON & FARRAHER,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 31, 1949.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

Plaintiff's motion for a new trial herein is hereby denied.

Dated: March 23, 1949.

/s/ LOUIS GOODMAN,

United States District Judge.

[Endorsed]: Filed Mar. 23, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73 (b)

Notice is hereby given that Ove Fog, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth District from the Judgment of Dismissal and Order Denying Motion for New Trial entered in this action on March 23, 1949.

/s/ RICHARD TUM SUDEN,

Attorney for Appellant

Ove Fog.

[Endorsed]: Filed Apr. 22, 1949.

[Title of District Court and Cause.]

DEPOSITION OF HUGO F. JABURG

Examination of Hugo F. Jaburg and Jean Ravaud, witnesses on behalf of plaintiff, held at the office of James A. Davis, attorney, at 259 Broad-

(Deposition of Hugo F. Jaburg.)

way, New York City 7, New York, on November 16th, 1948.

Present: Richard tum Suden, Esq., attorney for plaintiff, Jules Jacobs, Esq., attorney for defendant, Mr. Hugo F. Jaburg, Mr. Jean Ravaud, Mr. Ove Fog and Ruth H. DuFord.

Stipulated that all objections to the questions submitted shall be reserved and shall be presented at the time of trial.

MR. HUGO F. JABURG

being first duly sworn:

By Mr. tum Suden:

1. Q. Mr. Jaburg, you are Hugo F. Jaburg?

A. Correct.

2. Q. You reside in New York, where?

A. I reside at Winterton, New York.

3. Q. And you are engaged in business in New York? A. I am.

4. Q. In what business are you?

A. I am president of R. C. Williams & Co., Inc.

5. Q. Where is your office?

A. Principal office, 265 Tenth Avenue, New York City.

6. Q. What is the nature of the business of R. C. Williams & Co.?

A. R. C. Williams is in the food business and in the wine and spirits business. [1*]

* Page numbering appearing at foot of page of original Reporter's Transcript.

(Deposition of Hugo F. Jaburg.)

7. Q. You have a liquor division of R. C. Williams, is that the way it is?

A. We have a wholesale liquor division.

8. Q. How does that operate, what are its functions?

A. Supplies wholesale liquor to retail businesses, that is, both hotels and restaurants, principally in the metropolitan district.

9. Q. District of New York?

A. That is correct.

10. Q. You have a liquor distribution division as part of it?

A. I wish you would clarify the question.

11. Q. In addition to the wholesale liquor department, do you have an importing department or is that part of your liquor division?

A. We have a separate corporation, a subsidiary corporation.

12. Q. At the present time?

A. It is known as Carillon Importers, Ltd., place of business, 610 Fifth Avenue.

13. Q. That corporation is wholly owned?

A. Wholly owned by us.

14. Q. It is one—does it handle exclusively the distribution of imported liquor in the United States?

A. It handles imported as well as domestic.

15. Q. It distributes throughout the United States? A. That is correct.

16. Q. May I ask to please fix the time, referring back to 1942—say March, 1942, or the first

(Deposition of Hugo F. Jaburg.)

part of 1942, did you then have a wholesale liquor division? A. We did.

17. Q. Do you also have a distribution division or is that all one division?

A. At that time we had a wholesale division, which operated out of 265 Tenth Avenue under its own license and in addition to that we had an import division which operated out of 610 Fifth Avenue under a separate license.

18. Q. What did the import division handle?

A. It handled principally the same items that they handle today, that is, the same type of items, imported and certain domestic. [2]

19. Q. That is a part of R. C. Williams & Co.?

A. That is right.

20. Q. A department of it?

A. Operated as a separate business, with its own sales force, billing department, license.

21. Q. A division of it?

A. It was a division of R. C. Williams.

22. Q. And R. C. Williams owned the business, did it not? A. Yes.

23. Q. That is in 1942. Did that set up continue into subsequent years of 1943, 1944, 1945, 1946 and 1947? A. Yes.

24. Q. The import division, was that separate from the wholesale division? A. Yes.

25. Q. What products did it handle in 1942? Did they have a separate line of products?

A. Yes, they had a separate line of products. I can't give you the exact items.

(Deposition of Hugo F. Jaburg.)

26. Q. Did that import division have a special name?

A. It was originally known as the Continental Division and thereafter the name was changed due to the confusion with Continental Distributors Company and it was called Williams Importers Division, a division of R. C. Williams.

27. Q. When was Williams Importers—when was the name of the import division changed from Continental to Williams Importers?

A. I do not recall the exact date. If we refer to the records we can.

28. Q. I noticed in the answer it gives you the date.

Mr. Jacobs—I might state for the record, because the date is not important, that the Williams Importers was the same business, the same method of operation as was conducted in the Continental Importers.

29. Q. Referring to the pleadings in this case, have you read the complaint?

A. Generally I have read it.

30. Q. You have read it and you have read the answer, you know the allegations in the answer?

A. Well, I have a general knowledge of it, to be honest I do not recall all of it. [3]

31. Q. Speaking generally the allegations are correct?

A. Yes, the allegations are correct.

32. Q. You set forth certain answers in the answer and those findings are correct? A. Yes.

(Deposition of Hugo F. Jaburg.)

33. Q. Do you know Ove Fog? A. Yes.

34. Q. When did you first become acquainted with him, can you fix a date?

A. I cannot fix a date, probably in 1943.

35. Q. Prior to that date Mr. Fog had been employed by R. C. Williams Co., the Continental Importers, had he not?

A. Prior to the time I met him, he was engaged by Mr. Ravaud.

36. Q. What was the nature of his employment, do you know?

A. He was branch division manager for the Continental Importers division.

37. Q. Covering what territory?

A. The western territory.

38. Q. That is the territory referred to in the answer you set forth? A. That is right.

39. Q. Who employed Mr. Fog?

A. Mr. Ravaud employed Mr. Fog for Continental Importers Division.

40. Q. Who was Mr. Ravaud?

A. Mr. Ravaud is general manager of that division.

41. Q. He was in charge of that division?

A. Correct.

42. Q. Did he have any other function with R. C. Williams Co. A. No.

43. Q. He had the entire management and control of that division?

A. Subject to the executive officers and Board of Directors of the company itself.

(Deposition of Hugo F. Jaburg.)

44. Q. I might ask you, the employment of Mr. Fog was left to Mr. Ravaud, was it not? [4]

A. Yes, Mr. Ravaud employed Mr. Fog with an explanation to us of his qualifications and his belief that Mr. Fog would be a good employee for the company.

45. Q. Mr. Ravaud was authorized to employ Mr. Fog, was he not? A. He was.

46. Q. Did Mr. Ravaud fix the terms and conditions of Mr. Fog's employment?

Mr. Jacobs: I am going to object.

Mr. tum Suden: Mr. Fog's employment is important, I should like to ask this question.

47. Q. Would you say that Mr. Ravaud was an agent of R. C. Williams in the employment of Mr. Fog? A. Yes.

Mr. Jacobs: I object to the form of the question.

48. Q. You said he was authorized, I said he fixed the terms and conditions of his employment?

Mr. Jacobs: First it was as submitted to them and he acted on Mr. Jaburg's determination.

Mr. Jaburg: An agreement was drawn and it was approved by our attorney.

Mr. Jacobs: Not at that time.

49. Q. At the time Mr. Fog was employed I understand it was an oral agreement, so-called gentlemen's agreement.

A. I believe that is correct.

50. Q. Did R. C. Williams ratify and approve Mr. Fog's employment? A. They did.

(Deposition of Hugo F. Jaburg.)

51. Q. And the terms he had agreed upon?

Mr. Jacobs: I don't like to interrupt you, but you are asking him to make a legal conclusion. To the question—pursuant to such arrangements, did Mr. Fog [part of sentence omitted in copy] employment of the company, the answer is "yes."

52. Q. Under the terms and provisions agreed upon with Mr. Ravaud? A. Yes.

53. Q. R. C. Williams then had approved of the employment of Mr. Fog, stood back of him in the matter of his compensation and employment?

A. Yes. [5]

54. Q. Do you know, can you recall the terms and provisions of Mr. Fog's employment?

A. No.

Mr. Jacobs: That is outside of the issues. I do not think we are concerned with the terms of the employment and I am going to have to ask you to restrict yourself to the written agreement.

Mr. tum Suden: I disagree with you, they had an oral agreement under which Mr. Fog was employed and I am also getting into the written agreement and the oral agreement.

55. Q. I ask you then again, do you recall the terms and conditions of Mr. Fog's employment?

Mr. Jacobs: If you don't know you can say so.

A. Not without referring to the records. Generally I remember the agreement as to his appointment as western division manager.

56. Q. Could I put it this way—is it correct to

(Deposition of Hugo F. Jaburg.)

state that Mr. Fog was to receive compensation such as they agreed upon, a fixed sum of \$4,200, do you remember that?

A. I do not recall the exact sum. It was a certain amount of money plus a commission on certain items which were distributed through the import division.

57. Q. He was to receive, was he not, in addition to the fixed sum a commission on all liquor that was sold or distributed in his territory by the Continental Importers?

A. I believe that is correct as far as the sales of Continental are concerned.

58. Q. Is it not true that Mr. Fog's agreement covered not only current line of products that you then had at the time the agreement was made, as well as all future products that may be acquired by Continental and sold and distributed in that territory?

Mr. Jacobs: The oral agreement.

Mr. tum Suden: They had a certain line at that time, then if they acquired any additional lines he was to receive compensation on these additional lines.

Mr. Jacobs: Subject to arrangements of commissions.

Mr. tum Suden: With the schedule they fixed.

Mr. Jacobs: The schedule applies to the written agreement. [6]

Mr. tum Suden: It was not——

(Deposition of Hugo F. Jaburg.)

Mr. Jacobs: I have no schedule in my file. When we get to Mr. Ravaud we might work that out.

59. Q. I am going back to the general question that on additional lines it was understood he was to get the same commissions on the number of cases sold?

A. I don't recall the amount of commissions, but every item would have a different profit and you could not make a set rule that anything acquired in the future would bear the same commission.

60. Q. Do you know that or are you reasoning that way?

A. I know that I would not approve of such oral arrangements and I know Mr. Ravaud would not make it.

61. Q. If, after this oral arrangement was made you picked up a line of brandy and Mr. Fog handled that brandy in his territory, he would get the same commission on the cases of that brandy sold?

A. Not necessarily, he might receive a larger commission on an item like champagne and on brandy.

62. Q. Do you know of your own knowledge whether or not these terms were fixed by Mr. Ravaud?

A. Mr. Ravaud never made any statements to me that he had definite arrangements with Mr. Fog for specified commission on any item we might carry at any time.

(Deposition of Hugo F. Jaburg.)

63. Q. As I understand it, the commissions were fixed at the sliding scale, so much for the first 1,000, so much for the next 5,000, so much for the next 10,000 cases?

A. I would have to go back to the record.

64. Q. Put it this way, Mr. Jaburg. Suppose Mr. Ravaud had assured Mr. Fog that he would receive compensation on all liquors sold in his territory by Continental Importers of the R. C. Williams Co.—I say supposing he had made that arrangement with Mr. Fog—we will have to develop that, of course—supposing he had made such an agreement with Mr. Ravaud, you would concede that he would be entitled to his commissions?

A. Not in the case with R. C. Williams, but any arrangements that have been discussed with me were with regard to the Continental and I would want to see Mr. Fog compensated in the proper manner. Mr. Ravaud could not bind the company. He is only general manager of the import division.

65. Q. Suppose Mr. Ravaud has assured Mr. Fog that no liquor would be sold or shipped into his territory by R. C. Williams except through Continental Importers, would he then be entitled to his commissions? [7]

A. No, as I said before, Mr. Ravaud had no authority to go beyond the Import division.

66. Q. He represented R. C. Williams?

A. Only so far as the Import division was concerned and Mr. Fog was informed of that.

(Deposition of Hugo F. Jaburg.)

67. Q. Was not the employment of Mr. Fog left entirely in the hands of Mr. Ravaud?

A. Subject to the approval of the executives and the Board of Directors of R. C. Williams.

68. Q. That is between you and Mr. Ravaud, but between Mr. Fog and R. C. Williams there was no such understanding?

A. Mr. Fog knew that Mr. Ravaud was manager of the Import division and I am quite sure that Mr. Fog therefore knew that he would have nothing to do with any part of the business except by the Import division.

69. Q. If Mr. Ravaud in seeking Mr. Fog's employment made certain representations to him along the lines I have just discussed, and these representations were not denied by R. C. Williams & Co., would he not then be able to rely on the assurances of Mr. Ravaud?

A. I can only say that Mr. Ravaud had no authority to go beyond the Import division and I cannot assume that Mr. Ravaud made promises beyond that.

70. Q. I am not asking that question I am asking you assume Mr. Ravaud did that?

A. It was not binding on the company. Mr. Ravaud had no authority to go beyond the Import division.

71. Q. That is your reasoning for that, he should not receive commissions on additional lines?

A. No, I made the statement that had we taken

(Deposition of Hugo F. Jaburg.)

on any additional lines in the Import division and had sold them in the western territory, Mr. Fog would certainly be entitled to commissions depending on the profit.

72. Q. When did R. C. Williams take on the Harwood whiskey line?

A. I believe it was in 1944.

73. Q. That was subsequent to the employment of Mr Fog? A. That is right.

74. Q. Did R. C. Williams & Co. handle that as a wholesale distributor in the metropolitan area of New York?

A. They handled it—yes, as a wholesale distributor as well as—— [8]

75. Q. They handled it as a distributor in the United States, did they not?

A. Mr. Jacobs, tell him the reasons why Harwood was in on the——

76. Q. Can you not answer this—national distributor in the United States. Can you answer yes or no?

Mr. Jacobs: It is yes and no.

A. Harwood whiskey was handled by R. C. Williams on an entirely different basis than in our Import division. While we acted as a distributor for the brand in the United States at the insistence of the distillery, it was not included in our regular import division due to the fact that this distiller had certain distributors of his own through whom he had sold other products and he insisted upon

(Deposition of Hugo F. Jaburg.)

having these distributors handle Harwood as a different item and he also insisted upon appointing his own sales force who acted as brokers and received a brokerage on the sale of this whiskey.

77. Q. Is it not a fact that these sales of this liquor were handled through R. C. Williams against a thirty-day letter of credit?

A. They were handled by R. C. Williams through the wholesale liquor division as a separate item—different billing under a different license than that of the Continental Import division or the Williams Importers.

78. Q. How were orders placed with R. C. Williams & Co.?

A. Through these various brokers who operated throughout the United States.

79. Q. I do not understand that answer.

A. The orders were placed by the broker appointed by the distiller and telephoned or mailed into Mr. Irving Koerner who was in charge of our wholesale division at 265 Tenth Avenue.

80. Q. Mr. Koerner accepted these orders against a letter of credit?

A. Yes, he did.

Mr Jacobs: The way you put the question it is very easy to say "yes."

Mr. tum Suden: I am asking this witness, he can say, I do not think you should advise the witness how to answer, Mr. Jacobs.

Mr. Jacobs: Except this—we have a written

(Deposition of Hugo F. Jaburg.)

agreement and I cannot let the witness testify contrary to this agreement when I know he does not remember.

Mr. tum Suden: You can produce these agreements at the proper time, they speak for themselves. [9]

81. Q. The R. C. Williams Co. accepted the orders for Harwood whiskey against letters of credit, did they not?

A. We had various agreements with the distiller and I do not recall exactly the method of handling these orders without referring to the file.

82. Q. Is it not true that R. C. Williams then notified the distiller where to make delivery?

A. I do not recall the exact procedure. It was left in the hands of Mr. Koerner.

83. Q. Mr. Koerner accepted the orders on behalf of R. C. Williams?

A. I do not recall the method of handling these orders.

84. Q. Did you ever have any discussion with Mr. Fog relative to commissions on Harwood whiskey?

A. I believe we discussed the situation at one time and I explained to him then that while I would have liked personally to have had this brand in the Import division it was impossible under the arrangements it was stipulated by the distiller.

85. Q. Do you recall when that was and where?

A. I do not.

(Deposition of Hugo F. Jaburg.)

86. Q. Anybody else present?

A. I do not recall when and where.

87. Q. Was there only one conversation on that subject?

A. There might have been more.

88. Q. Did you have any conversation with Mr. Fog at the Palace Hotel in San Francisco?

A. I had many conversations with Mr. Fog at the Palace Hotel, but perhaps not about Harwood.

89. Q. Do you recall any about Harwood?

A. No, except my explanation at the time that there was nothing we could do about it.

90. Q. You do not recall where?

A. It might have been in the Palace Hotel or in New York.

91. Q. Do you recall the incident when you agreed that Mr. Fog should receive the sum of \$10,000 in settlement of his claim for commissions on Harwood whiskey? [10]

A. I recall the sum of \$10,000, but not exactly what the situation was without going back to the files. May I say at this time that R. C. Williams is quite a large organization with many departments. It would be impossible for me to recall items and times and places of matters such as these in business of this sort. We have a volume in cases of \$40,000,000 a year on liquor and groceries and if I was able to recall all of the items of two different liquor departments I would be a marvel.

92. Q. What was the gross in the liquor division?

(Deposition of Hugo F. Jaburg.)

A. That is varied from time to time, perhaps it has gone as high as \$15,000,000 or \$20,000,000 on the two liquor divisions.

93. Q. Per annum? A. Per annum.

94. Q. You do not recall the time you met Mr. Fog and made this agreement with him relative to his compensation?

A. I do not recall the exact terms of any agreement without going to that agreement and refreshing my memory.

95. Q. You do not know how the sales of Harwood whiskey were handled by R. C. Williams?

A. I do not recall the exact details, changes were made from time to time.

96. Q. May I ask you this question—did you deny to Mr. Fog that he was entitled to commissions on Harwood whiskey?

A. Yes, in view of the fact it was handled apart from the Import division and he was an employee of the Import division.

97. Q. You based your decision on that reason?

A. Yes, he was fully informed of the facts and continued to work for us.

98. Q. Did you inform him personally?

A. I believe I discussed the matter with him personally on one of my visits to the coast or when he was in New York.

99. Q. Subsequent to that settlement of which you have a vague recollection, did you then make any further agreements with Mr. Fog in regard to his employment?

(Deposition of Hugo F. Jaburg.)

A. I do not recall at this time. [11]

100. Q. Do you know whether he had any written agreement concerning his employment?

A. Yes, I believe there was a written agreement entered into with regard to the amount of commissions to be paid, naming various items on which these commissions were to be paid.

101. Q. You do not recall the period?

A. Not without reference to the records.

Mr. tum Suden: That is all, Mr. Jaburg.

By Mr. Jacobs:

1. Q. Is it not a fact, Mr. Jaburg, that the wholesale division, in contradistinction to the Import division, had its own personnel, its own book-keeping system, its own——

Mr. tum Suden: I object to that. You are not cross-examining, are you? I want to have it now stipulated that this examination of Mr. Jaburg is by way of cross-examination, you understand that.

Mr. Jacobs (Continuing): ——license, its own sales force, its own bank account, at least on the books, different from that of the Import division, which also had its own personnel, its own sales representatives, its records and bank accounts?

A. That is correct.

2. Q. On direct cross-examination you were asked whether the present Import division, known as Carillon, had the same products as you had in 1942 and you said “yes”—did you take into account in your answer the question of Harwood?

(Deposition of Hugo F. Jaburg.)

A. I did not, because Harwood whiskey only became an item for the Carillon Importers in September, 1947. Up to that time it was handled by the wholesale division.

3. Q. Up to 1947 it was not handled any way?

A. We did not acquire that brand until 1944.

4. Q. In connection with Mr. Ravaud's functions—did he hold any other position with R. C. Williams, official or otherwise, other than general manager, no matter in what name?

A. He did not.

5. Q. Did he have any power of attorney or authority from R. C. Williams & Co., Inc., to bind R. C. Williams & Co., Inc., in any way other than through the Import division under your instructions? A. He did not. [12]

6. Q. In working out the Harwood arrangement did you personally participate in all the negotiations leading up to the agreement?

A. I did not.

Mr. tum Suden: Agreement between whom?

A. The distiller and R. C. Williams & Co.

7. Q. Your answer is?

A. I did not.

8. Q. Do you recall any of the details outside of the general ones provided for in the Harwood agreement?

A. That was left entirely in the hands of Mr. Koerner, who was in charge of that item.

9. Q. You do not know whether R. C. Williams & Co. accepted an order or did not?

(Deposition of Hugo F. Jaburg.)

A. I do not.

By Mr. tum Suden:

10. Q. The Carillon Importers is a recently formed corporation? A. That is right.

11. Q. It took over the Import division of R. C. Williams?

A. It took over the items that were there then and has since acquired other items.

12. Q. That include Harwood?

A. Harwood was not in the Import division at any time until Carillon Importers was formed as a separate corporation. In fact this was done at the request of the distiller who did not want Harwood in the regular R. C. Williams import division.

13. Q. Prior to that time R. C. Williams accepted the orders on behalf of the distillery?

A. I do not know the exact procedure.

14. Q. What compensation did R. C. Williams get for handling these transactions?

A. As I recall it we were to receive compensation of \$1.50 per case out of which we had to pay brokerage fees to the various brokers appointed by the distiller.

15. Q. This \$1.50—are you sure it is \$1.50 a case?

A. I do not recall the exact figure and I am not quite positive of whether it was \$1.50 or less. [13]

16. Q. Is it not a fact that R. C. Williams paid the distillery a certain sum for a case and sold it to the distributors or in Mr. Fog's territory for an additional sum and does not represent the \$1.50?

(Deposition of Hugo F. Jaburg.)

A. I do not recall the exact procedure without reference to the files. All I know is that it was far less than a normal profit item would bear, it was handled entirely differently.

17. Q. Your profit on the sale of this would be \$1.50 a case?

A. Less, we had to pay commissions.

18. Q. Who did you pay the commissions to?

A. To certain brokers appointed by the distiller.

19. Q. These brokers made sales for R. C. Williams?

A. I do not remember the exact procedure.

Mr. Jacobs: The figure should be \$1.60, I'll show you. Mr. Jaburg, did you entrust the drawing of the special Harwood agreement between the distillery and R. C. Williams to me? A. I did.

Mr. Jacobs: And if I told you the amount was \$1.60 per case and \$.60 was to be paid to the brokers appointed by the distillery, would you say that was correct? A. I would.

By Mr. tum Suden:

Q. Have you a copy of the agreement between R. C. Williams and the distillery?

Mr. Jacobs: Not with me.

Q. Could you get one for me?

Mr. Jacobs: Sure.

Q. Will you send me a copy?

Mr. Jacobs: I will be glad to.

/s/ HUGO F. JABURG. [14]

(Deposition.)

MR. JEAN RAVAUD

being first duly sworn:

By Mr. tum Suden:

1. Q. Mr. Ravaud, you are Jean Ravaud and are employed by R. C. Williams Co.?

A. I am not employed by R. C. Williams Company. I am general manager of Carillon Importers, Ltd.

2. Q. Referring back to 1942, were you then employed by R. C. Williams?

A. As general manager first of the Continental Importers, 610 Fifth Avenue, New York City, and as general manager of Williams Importers, same address.

3. Q. You reside in New York?

A. I reside in Verdi, Nevada, and for the moment in New York City.

4. Q. You are nevertheless an employee of R. C. Williams?

A. I am not—I am an employee of Carillon Importers, Ltd.

5. Q. In 1942?

A. In 1942 I was an employee of R. C. Williams.

6. Q. R. C. Williams Co. paid your salary?

A. I was paid by separate bank account of the division.

7. Q. That was from funds of R. C. Williams, was it not? A. Well——

8. Q. It was Continental Importers, was it not?

(Deposition of Jean Ravaud.)

A. It was a division, separate bank accounts, with the proceeds of the sales of the division.

9. Q. These proceeds belonged to R. C. Williams & Co.? A. Yes.

10. Q. You know Mr. Ove Fog?

A. I do.

11. Q. When did you first meet Mr. Fog?

A. I believe it was in 1942.

12. Q. Under what circumstances?

A. At the time we were looking for a western division manager and Mr. Fog was recommended to me and I went to San Francisco to see him.

13. Q. Prior to going to San Francisco you corresponded with him?

A. Just a letter and arranging the necessary appointment. [15]

14. Q. Did you proceed to San Francisco?

A. I did.

15. Q. Do you remember the date?

A. Exactly I do not remember, but I believe in 1942.

16. Q. Early part?

A. The Spring, I think, of 1942.

17. Q. Did you discuss his employment with him? A. I did.

18. Q. Did it ultimately result in your employing him?

A. I decided the principal of the terms and conditions of his employment. I had to refer to the president, Mr. Jaburg.

(Deposition of Jean Ravaud.)

19. Q. I beg your pardon—did you tell Mr. Fog you would have to refer him to Mr. Jaburg?

A. I believe I did tell him that as far as I was concerned it was a deal, but I had to take up the matter in New York.

20. Q. Did you confirm that later?

A. I think it was a letter to Mr. Fog. It was not a contract, it was a letter submitting the terms and conditions of his employment.

21. Q. You sent him a letter submitting the terms and conditions of his employment?

A. I believe I did.

22. Q. Do you have a copy of that letter?

A. I believe it is in the file.

23. Q. Do you have it here?

(Mr. Ravaud refers to file.)

A. To be exact I do not remember whether it was a letter sent to Mr. Fog or an inter-office memo to Mr. Jaburg that I sent to the accounting department and also to Mr. Fog. I do not remember exactly how it was handled.

24. Q. Would it be possible for you to secure a copy of that letter?

A. I believe so. If we don't have it, I believe it was a memorandum.

25. Q. It is a fact, is it not, that maybe you did not send such a letter?

A. I don't remember whether it was a letter or an inter-office memorandum for us and a copy to Mr. Fog. I know something was written. [16]

(Deposition of Jean Ravaud.)

26. Q. You know you wrote him something about something?

A. I remember it was a schedule of commissions.

27. Q. When you interviewed Mr. Fog in San Francisco what representations did you make to him relative to the products to be handled?

A. At the time I told Mr. Fog it was to handle the products handled by Continental at that time and submitted to Mr. Fog the items which were were handling at Continental.

28. Q. Did you discuss with him the future plans of Continental?

A. I told him we hoped for additional products, it was at the time—it was the start of our new division and I remember telling him that I hoped we would have additional products.

29. Q. Did you advise him that the Continental Importers were handling or in charge of all the imported products of R. C. Williams Company?

A. At the time, yes—at the time we were.

30. Q. What other liquors were imported and distributed by Williams at that time, were in the Continental Importers division?

A. I don't know all of them.

31. Q. What ones were excepted?

A. Two items—a Greek brandy—which was handled by the wholesale division.

32. Q. For metropolitan New York?

A. No, for all over the country.

33. Q. Terms?

(Deposition of Jean Ravaud.)

A. Not on a distributor basis—it was a product not available here on account of the war and R. C. Williams was distributing what was left. Other miscellaneous items I really do not recall what they were, which were special importations of R. C. Williams.

34. Q. You represented to him then that in addition to the products that you mentioned at the time that you had hopes of increasing the list of products for national distribution?

A. Yes, I did.

35. Q. Did you at that time picture to him the proceeds of that division and the possibility of his commissions?

A. I do not recall. I remember that with what we had to sell at the time, in 1942, of course his income would not be spectacular, but we had a long range in the future as we got new agencies. [17]

36. Q. Did you assure him that R. C. Williams would not ship into his territory except through Continental?

A. When we discussed the terms—not at that time.

37. Q. You didn't give him any such assurances?

A. Not at that time, when we made the terms of his employment.

38. Q. Any time during the time of his employment?

A. I mentioned it once. I think it was after a shipment of rum to San Francisco and I told or

(Deposition of Jean Ravaud.)

I wrote to Mr. Fog that would not happen again and if I recall what I told him, it was because we did not want any item in competition with our products sold in the west coast and I realized that it was in competition to our sales of another rum which we had the agency for in America.

39. Q. That shipment was sent out by R. C. Williams and not through the Continental Importers?

A. The rum shipment—it was shipped by us for one of our distributors as an accommodation.

40. Q. Mr. Fog objected to that procedure, did he not?

A. Yes he did and he called my attention to that shipment to San Francisco.

41. Q. It was in violation of your understanding with him?

A. When Mr. Fog advised me of this shipment to San Francisco it was not in relation with his agreement. He just called my attention to the fact that it was detrimental to our merchandising policy.

42. Q. And you assured him that would not happen again? A. I did.

43. Q. That was prior to the time that R. C. Williams handled Harwood whiskey?

A. Yes.

44. Q. That was in 1943? A. 1943.

45. Q. What were the provisions of this oral agreement that you had with Mr. Fog when you first employed him?

(Deposition of Jean Ravaud.)

A. He had a nominal salary of, I believe, \$4200 a year plus a commission on a per case basis on a progressive scale plus part of his traveling expenses. [18]

46. Q. That per case scale was to be applied on all liquors sold in his territory by Continental?

A. For the submitted items of Continental Import division.

47. Q. And also in connection with any additional products?

A. Not for the entire products. We decided the principal of the commission and the amount of that commission was to be determined, and if possible included in that same chart or scale of progressive commissions. As a matter of fact, we had another product in the meantime, a year after, I think, which was lemon extract for which a commission was decided because it was a new item and that commission was a new commission. I know the commission had nothing to do with the commission paid on the liquor.

48. Q. It was a separate item? A. Yes.

49. Q. The same principal would apply, would it not, if you sent out—say coffee?

A. Certainly, the same principal applies. If it would have been another spirit none on which the commission could be determined on a per case basis.

50. Q. That did not apply on cordials, wines and liquors?

A. Yes—none on a per case basis and the com-

(Deposition of Jean Ravaud.)

mission would have varied according to the type of merchandise and the margin of profit of our division.

51. Q. If a new cordial was added and handled in that territory that would have the per case commission applied to it? A. Yes, it would.

52. Q. Do you recall when Harwood whiskey was first sent out to the coast?

A. I do not remember. I think it was 1944. I really do not remember the date. As a matter of fact I knew nothing of the transactions of R. C. Williams with Harwood.

53. Q. You know nothing about that?

A. The only thing I know that is that once in a while to accommodate a customer I asked Mr. Koerner if he could not have some whiskey shipped to a particular distributor, wherever he was, and very often I could not get satisfaction.

54. Q. In the placing of orders?

A. In the acceptance of orders. He could not accept orders even suggested by me because it was the privilege of the distiller. [19]

55. Q. Whether or not he only filled the orders? A. That is right.

56. Q. Did you ever have any discussions with Mr. Fog relative to his commissions on Harwood whiskey?

A. Well, I did not discuss the question of commission with Mr. Fog, because Mr. Fog brought up the matter a few times when he saw that some Har-

(Deposition of Jean Ravaud.)

wood was shipped by the distributor to his territory. We discussed Harwood but not the commission. Mr. Fog told me a number of times that he would like to have helped a few of his distributors in getting them some Harwood. I remember that on two or three occasions—one was a distributor in Nevada—as an accommodation I tried to get some whiskey from Mr. Koerner. Mr. Fog's demands were exclusively to help our distributors and the matter of commissions was not mentioned. We mentioned it in 1945 and I told Mr. Fog that we had nothing to do with Harwood, that Harwood was entirely handled by R. C. Williams, 265 Tenth Avenue, and our division had nothing to do with it and I pointed out to him that even our salesmen could not handle Harwood as Harwood was sold through brokers appointed by the distributor in Canada.

57. Q. Could you give me the name of any broker who handled it in his territory?

A. The name of the brokers handling on the coast? I think we mentioned the names of brokers handling Harwood.

58. Q. Can you give me names of any brokers who handled Harwood whiskey in Mr. Fog's territory?

A. I think—I really don't know. I do not follow that.

59. Q. You do not know the brokers?

A. I do not have that at all.

60. Q. What do you base your information on?

(Deposition of Jean Ravaud.)

A. I know a few of them—none on the coast. In my conversations with Mr. Koerner I had been told a few times or I was asking him for information about the merchandising policy of Harwood and I was told by him that the brokers in different territories were appointed by the distillery and they were paid by R. C. Williams out of the gross profit of R. C. Williams.

61. Q. That gross profit, I think, was stated at \$1.60 a case?

A. Personally I do not know. I have never seen the contract or agreement of contract between R. C. Williams and the distillery. I cannot answer that.

62. Q. You cannot tell us how these transactions were handled? You know nothing about that?

A. Nothing—I know all the shipments were made by the distillery and never by R. C. Williams?

63. Q. The shipments?

A. Yes, everything was direct.

64. Q. R. C. Williams did not warehouse the liquor and ship it out? A. That is right.

65. Q. They handled the distribution?

A. That is right, with the exception of New York.

66. Q. You handled it direct there?

A. That is right.

67. Q. Did you not assure Mr. Fog that all shipments of liquor into his territory would go through Continental Importers?

A. The only time I mentioned or wrote, I do not

(Deposition of Jean Ravaud.)

recall, to Mr. Fog about this matter was in reference to that rum shipment which I mentioned before.

68. Q. That is the only time?

A. The only time I mentioned it or wrote.

69. Q. You cannot recall any assurances verbally or otherwise? A. No.

70. Q. Did Mr. Fog in 1945 discuss with you his claim for commissions on Harwood?

A. He did.

71. Q. What was that discussion?

A. The discussion was, I think it was in New York, or Mr. Fog came to New York in 1945, the early part of 1945 and Mr. Fog—first Mr. Fog wrote me a letter about it saying that he felt he was entitled to a commission because it was his territory. I believe I wrote back to Mr. Fog that I did not understand his claim because I explained to him time and time again that the import division of Williams Importers had nothing to do with the import and sale of Harwood.

72. Q. Williams or Continental?

A. Williams at the time and that therefore as he was employed by Williams Importers, which in fact was an entirely different organization, he was not entitled to any commission. I think that Mr. Fog then came to New York a couple of months or a few weeks later and discussed the matter again. [21]

73. Q. With you personally?

A. Personally and I think also with Mr. Jaburg, and in a couple of conferences, without recognizing

(Deposition of Jean Ravaud.)

the claim of Mr. Fog, he almost as a gesture, because we wanted him to go back to the coast with the right frame of mind, we decided to give him the sum of \$10,000.

74. Q. That was in New York?

A. I don't remember if we gave him the \$10,000 or we sent it to him.

75. Q. That was a gesture of good will?

A. Yes, he had a kind of bitter taste in his mouth because of the Harwood in California.

76. Q. That was not a payment on account of his commissions?

A. No, nothing to do with commissions.

77. Q. Was that the last transaction you had with Mr. Fog relative to commissions on Harwood?

A. That is all.

78. Q. Did you have any conversation in San Francisco with him about commissions on Harwood?

A. No, prior to that when I just explained to him about the conferences here and his claim for commissions, but after that I believe I wrote a letter to Mr. Fog which Mr. Fog signed and we never spoke about Harwood. The only time was when Mr. Fog, to accommodate a customer or two asked if it were possible to get a few cases.

79. Q. Did you at any time in the interval in the time he was paid the \$10,000 assure him that R. C. Williams would not ship any products except through Continental? A. No.

80. Q. Did you do that subsequent to that time?

A. No, I did not.

(Deposition of Jean Ravaud.)

81. Q. Did you handle all the questions relative to Mr. Fog's commissions yourself or did you refer it to anyone else?

A. You speak about the payment?

82. Q. His claim or request for a commission on Harwood?

A. I did not decide myself. That was discussed with Mr. Jayburg, I believe. I am sure it was Mr. Jayburg and the other directors of the company.

83. Q. Nobody else handled that question with Mr. Fog?

A. I do not believe so. I don't know who would have discussed it with him. [22]

84. Q. Do you know a man by the name of Ackerman?

A. Oh, yes, Ackerman. Mr. Ackerman was my sales manager and he did not handle any question of commission on Harwood. If my recollection is right, he corresponded regarding getting them half a car of Harwood. That correspondence was, I think, between Mr. Ackerman and Mr. Fog.

85. Q. Mr. Ackerman had nothing to do with the question of commission?

A. Absolutely nothing.

86. Q. He was your general sales manager?

A. He was our sales manager.

87. Q. For the Import division?

A. Exclusively for the Import division. I don't know if he discussed the matter of the commission with Mr. Fog, but I can say that he had no authority at all to discuss such matters.

(Deposition of Jean Ravaud.)

88. Q. Mr. Ackerman?

A. Yes, Mr. Ackerman—all questions of compensation of any kind—that was my responsibility.

89. Q. When was Mr. Ackerman your general sales manager, what period?

A. From 1944, I believe, to 1947, to the summer of 1947.

90. Q. He is still in your employ?

A. No.

91. Q. Do you know where he is now?

A. I think he is in the middle west somewhere.

92. Q. He does not represent R. C. Williams?

A. He never represented R. C. Williams. He is no longer with the firm in any capacity.

By Mr. Jacobs:

1. Q. In phrasing a question, Mr. tum Suden said, as closely as I recall “the \$10,000 was not a payment on account of commissions,” and as I recall it, your answer was “no, it was not”—is it not a fact that the \$10,000, while not being a payment for commissions, was in satisfaction for any possible claim for such commissions that Mr. Fog might have or might claim to have in the future?

A. Yes.

2. Q. In connection with your statement about Mr. Ackerman, do you actually know what Mr. Ackerman wrote to Mr. Fog and do you actually know of your own knowledge what conversation he might have had with Mr. Fog? [23]

A. I don't know about conversations—I remem-

(Deposition of Jean Ravaud.)

ber letters written by Mr. Ackerman to Mr. Fog mentioning very clearly or confirming what I said to Mr. Fog that our division had nothing to do with the import of Harwood and we were not financially interested in Harwood.

3. Q. Would you say that Mr. Ackerman did not discuss the question of commissions, but had no authority? A. He had no authority.

4. Q. The letters you saw in the file, purportedly written by Mr. Ackerman, were letters based on your discussion with Mr. Ackerman of the question of Mr. Fog? A. I believe so.

5. Q. You are not sure of all the letters that **Mr. Ackerman** might have written?

A. No, I did not see all of the letters.

6. Q. You saw some of them?

A. I did.

7. Q. Did you not turn over the question of Mr. Fog's commissions to Mr. Ackerman?

A. No, I did not, not the question of commissions. My correspondence was with Mr. Fog. He saw most of the letters I wrote to Mr. Fog and the letter written by Mr. Fog to me.

By Mr. Fog:

Q. Is it not, Mr. Ravaud, a fact that you told me at one time in New York that you had turned over to Mr. Ackerman all the dealings as to information regarding Harwood whiskey on your behalf?

A. Yes and no. At the time, it was in 1945, and

(Deposition of Jean Ravaud.)

I was leaving with Mr. Jaburg for France and whenever you have any question about Harwood. As I said here, when I left, I told Mr. Fog—if you want to know anything about Harwood ask Mr. Ackerman, who in turn would ask Mr. Koerner.

/s/ JEAN RAVAUD.

[Endorsed]: Filed DC Dec. 17, 1948.

[Endorsed]: Filed CCA May 19, 1949. [24]

In the Southern Division of the United States District Court for the Northern District of California

No. 28,121-G

OVE FOG,

Plaintiff,

vs.

R. C. WILLIAMS & COMPANY, INC.,

Defendant.

Before: Hon. Louis E. Goodman, Judge.

REPORTER'S TRANSCRIPT

Tuesday, December 28, 1948

Appearances:

For Plaintiff: Richard tum Suden, Esq.

For Defendant: James Farraher, Esq.

The Clerk: Fog vs. Williams & Company.

Mr. tum Suden: Ready.

Mr. Farraher: Ready.

Mr. tum Suden: If the Court pleases, I do not know whether you are familiar with the pleadings, or not, in this case, but this action is one on a claim for commissions claimed by the plaintiff to have been owing to him under an agreement whereby he was appointed the Western Division Manager of R. C. Williams & Company, Continental Import Division. The Continental Import Division is a division of R. C. Williams & Company, the defendant in this action. It is not an indeepndent corporation, but is just a department.

Briefly, the plaintiff, Ove Fog, was engaged to be the Western Division Manager for the Continental Import Division of R. C. Williams. He was employed by a representative of R. C. Williams, Jean Ravaud, who sought him out, and made a verbal agreement relative to his employment. It was agreed that he was to have a certain salary plus an override or commissions on the amount of liquor shipped and sold in the territory.

At that time, at the time the contract was entered into, the Williams Company had certain lines which it was a national distributor for, and it created the department to take care of the national distribution. It also was contemplated that additional lines would be secured and a large department built up.

Then it so happened subsequent to the employment of Mr. Fog that a brand of whisky known as Harwood came into the market and bottles were

labeled "Imported by R. C. Williams & Company." Then a controversy arose as to whether or not Mr. Fog was entitled to commission on the sale of this liquor which appeared [2*] in the territory, it being Mr. Fog's contention (and we will support that by evidence) that no liquors were to be shipped into this territory by R. C. Williams except through Continental Import Division. In response to his inquiries and requests for commissions, he was advised that R. C. Williams & Company had nothing to do with the sales of this liquor and did not handle it, that it simply cleared it for the distillery, a Canadian corporation, as an accommodation, because of the fact that R. C. Williams & Company had the wholesale distribution of the Harwood whisky in the metropolitan New York area.

It developed later that some sort of a compromise or adjustment was made, whereby R. C. Williams & Company paid Mr. Fog the sum of \$10,000 under certain circumstances which we will have to develop during the course of the trial, there being two different versions of the payment of this money: One was, as claimed by some of the representatives of the defendant, that it was simply as a matter of good will, and again in a memorandum which they prepared, as a settlement of his claim for commissions on the Harwood whisky. Whichever way it was, the basis for the payment of this money and for the relinquishment of Mr. Fog's claim for commissions, we contend, were based upon misrepresenta-

* Page numbering appearing at top of page of original Reporter's Transcript.

tions, and that by reason thereof Mr. Fog was entitled to have that so-called agreement set aside, and he would be entitled to the commissions on the number of cases which had been shipped into [3] this territory by R. C. Williams. Briefly, the number of cases admitted by the defendant in the answer was somewhere around 500,000 cases covering the period involved here. We request that judgment should be given in favor of the plaintiff and that, if necessary, a master be appointed to make an accounting to determine the exact number. That is the position of the plaintiff in the action, if the Court pleases.

Mr. Farraher: May I make a brief statement of our position, if your Honor please? The plaintiff, as your Honor doubtless has observed, alleges that there was a dispute over these commissions that had been going on for some months, and a settlement was made in writing of that dispute. The complaint in that regard says that on March 8, 1946, after repeated statements by defendant, that it had not and was not handling the importation into or sale of Harwood whisky in plaintiff's territory, was not receiving any compensation for the sale of such whisky in said territory, the defendant, relying upon those representations, accepted \$10,000 in settlement.

He then seeks to avoid that settlement by the allegation that he did not know that Williams & Company had anything to do with the sale of Harwood whisky in this territory, and furthermore that

he had no knowledge that they were receiving any compensation for handling Harwood whisky until he discovered it in January, 1948. [4]

We expect to prove, if your Honor please, that for pretty near two years prior to the settlement there was a continual flow of correspondence between this plaintiff and the head of his organization, a Mr. Ravaud, with reference to the sale of Harwood whisky in this territory. We will offer to show that repeatedly he was calling attention to the fact that this person or that person got Harwood whisky, and that they wanted the whisky to come to the customers of this division of which the plaintiff was the president. We will also show by correspondence, both of the plaintiff and the defendants, that he was advised that they were making \$1 a case on this whisky all of the time, and with that complete knowledge of all those facts, that he made the settlement in March, 1946. We will also show that at that time a new contract was entered into, this time a written contract, which eliminated any reference to Harwood, specifically limited the business to the business done by the division, of which the plaintiff was a member, that that contract was signed, that in the following March, 1947, the plaintiff resigned, and at the time he resigned he accepted additional pay of \$10,000 again, and in doing so he released the plaintiff from all claims of any kind for the past or future.

We submit, if your Honor please, the evidence will show that the settlement was made and that

there was no ground existing which would permit the court to set it aside. [5]

Mr. tum Suden: I might state one further fact, if your Honor please, which we will show, and that is the discovery of these misrepresentations was caused by the fact that the Bureau of Internal Revenue, the Alcoholic Division, subpoenaed Mr. Fog relative to the sale of Harwood whisky in the United States, involving another case, and at that time he ascertained that R. C. Williams & Company actually did buy and import the Harwood whisky in this country and did sell it in this territory contrary to their representations to him continually throughout the entire period.

The first witness I will call will be Mr. Fog, if the Court please.

OVE FOG,

the plaintiff herein, was called as a witness on his own behalf, and being first duly sworn, testified as follows:

The Clerk: State your name to the Court.

A. Ove Fog.

Direct Examination

By Mr. tum Suden:

Q. Mr. Fog, you are Ove Fog, the plaintiff in this action? A. I am.

Q. You are a resident of the City and County of San Francisco? A. I am.

Q. How long have you been a resident of the

(Testimony of Ove Fog.)

City and County of [6] San Francisco?

A. About 15 years.

Q. About 15 years? A. About.

Q. You are a naturalized citizen?

A. I am.

Q. Born in Denmark?

A. Born in Denmark.

Q. When did you come to the United States?

A. I think in 1926.

Q. 1926? A. Yes.

Q. Referring to the year 1941, what was your business?

A. In 1941, in the latter part of 1941, I was employed by Schenley Distillers, heading one of their divisions.

Q. In connection with the sale of their products?

A. In connection with the sale and promotion of their products.

Q. Did that continue into the year 1942?

A. Yes, that continued until I asked to be released from that position to take over a position that was offered to me by R. C. Williams & Company.

Q. How did you first become acquainted with the firm of R. C. Williams?

A. I received a letter, I believe, some time in March from William Williams, Importers, a division of R. C. Williams, in [7] which Mr. Ravaud asked me whether I was in a position to consider another position.

(Testimony of Ove Fog.)

Q. I will show you a letter dated March 26, 1942, addressed to you from Continental Import Division of R. C. Williams, signed by Jean Ravaud, and ask you if this is the letter which you just referred to?

A. Yes, that is the letter.

Mr. tum Suden: Does the Court want me to read this letter?

The Court: Is there any point in putting it into the record?

Mr. tum Suden: I want to show how Mr. Fog was employed, the negotiations leading up to his employment and the representations made at that time, because that is the basis of his employment.

The Court: Is there any dispute about the employment?

Mr. Farraher: There is no dispute about the employment at all, if your Honor please. I was making no objections. I thought it might be preliminary to something, but it would seem to me the question of his employment could not arise until it is shown that the settlement that was made was a furtive settlement. If the settlement was made, it does not make any difference what his contract was.

The Court: I glanced at the complaint and answer and it does not seem to me there was any dispute about the fact that the plaintiff was in the employ or had a business relationship with the defendant. [8]

Mr. Farraher: That is right. It is admitted in the pleadings.

(Testimony of Ove Fog.)

Mr. tum Suden: I want to bring out the terms of his employment, if the Court please.

The Court: Is that disputed?

Mr. tum Suden: Yes, that is disputed.

Mr. Farraher: I do not want to be too strict in my objections, but it occurs to me inasmuch as they have alleged a settlement and asked the Court to set aside the settlement, they would first have to establish that that is a void settlement. If that is a valid settlement, it doesn't make any difference what the history of this man's employment was.

The Court: I think there is an admission in the answer of the terms of employment, the compensation, isn't there?

Mr. Farraher: That is true.

Mr. tum Suden: The question that is in issue, if the Court pleases, is the fact that when Mr. Fog was employed, he was told by Mr. Ravaud, who came out here to employ him, the conditions of his employment. There was nothing in writing. It was an oral agreement, and one of the conditions which is in dispute affects the sale of Hardwood whisky in this territory, that is, no merchandise would be shipped into this territory by R. C. Williams except through the offices of the Continental Import, of which Mr. Fog was the manager, and upon all of those shipments he would receive his commissions. Then it turns out that they [9] did ship Harwood whisky into this territory, but they did not ship it through the Continental Import Division, but

(Testimony of Ove Fog.)

claimed they had nothing to do with the sales, that the distillery handled the sales: therefore they had nothing to do with the sales. They made no money on it.

The Court: You are in dispute on this point: You claim the plaintiff was to receive compensation on all goods shipped into this territory by the defendant whereas the defendant claims that that agreement only covered merchandise that was shipped in by the so-called Continental Import Division?

Mr. tum Suden: Through the Continental Import.

The Court: Is that in issue?

Mr. Farraher: That is in issue, and if that is the purpose, the purpose stated by Mr. tum Suden removes my objection.

Mr. tum Suden: I do not think there is any issue as to his actual employment, but the terms of his employment. This is preliminary. I will withdraw this exhibit unless the Court desires it.

Q. Mr. Fog, after some correspondence you were approached by Mr. Ravaud?

A. Yes, a few weeks later I received a letter from Mr. Ravaud advising me that he intended to make a trip out to the Coast here to meet me and talk over matters.

Q. Did he come to San Francisco?

A. Yes, Mr. Ravaud came to San Francisco. [10]

Q. Did you meet him? A. Yes.

(Testimony of Ove Fog.)

Q. Where did you meet him?

A. I met him at the St. Francis Hotel.

Q. Was anybody else present? A. No.

Q. Just the two of you? A. Yes.

Q. What was the subject of that conversation or did you hold any conversation?

A. Yes, we had quite a long conversation. Mr. Ravaud told me that he came from New York, from R. C. Williams & Company and that they had created a division called Continental Import Division, for which he was the general manager. This division was formed for the purpose of taking care of R. C. Williams national sales. So that Your Honor would understand what that means in this instance, I must mention that R. C. Williams, prior to the forming of the Continental Import, was doing liquor business through a liquor department, which was a wholesale liquor department, and this department took care of their metropolitan New York business. Besides that, I understand they also had——

Mr. Farraher: If Your Honor please, we object to this witness testifying what he understands the corporation does.

The Court: You will have to limit it to his conversation. [11]

Q. (By Mr. tum Suden): Repeat the conversation so far as you can between you and Mr. Ravaud relative to your employment.

A. Yes, sir. Well, my statements that are made refer to what Mr. Ravaud told me.

(Testimony of Ove Fog.)

Q. He explained to you the setup of the R. C. Williams liquor division and so on?

A Yes, sir, that is what I was referring to here. Mr. Ravaud explained to me that the wholesale liquor division of R. C. Williams was taken care of in the metropolitan New York business, and that the Continental Import Division was to take care of R. C. Williams national distribution for whatever agency they already had or whatever agency they might get in the future. That was the distinction between those two departments of R. C. Williams & Company.

Mr. Ravaud furthermore told me that, of course, in the beginning they had only a few lines, but they expected to get very important lines, and then the Continental Import Division would be the leading house in that field in the United States because R. C. Williams & Company was an old house, and through that old house and due to the fact that they were well known they would be able to secure good lines as time went on.

Q. Did he make any arrangement with you as to compensation?

A. With reference to my compensation, Mr. Ravaud asked me what I had in mind, whether I was in favor of a set salary or whether I would prefer a small guarantee and a commission. I told Mr. Ravaud that I was in favor of receiving a small guarantee and then a commission on all merchandise that went out from my territory, based on the

(Testimony of Ove Fog.)

fact that I saw the import of R. C. Williams & Company and what that house stood for; such an arrangement for me should open great possibilities, and then, of course, I depended on my own abilities to do a good job.

Q. You had been in the liquor business how many years?

A. I had been in the liquor business since Prohibition. I was in the early—just after Prohibition.

The Court: I think he has answered the question, but he still did not answer your question as to what the conversation was.

Q. (By Mr. tum Suden): What arrangements did you make about compensation? You only started in on that.

A. When we started in, the guarantee was set, the small guarantee was set at that time—I think it was \$4,200 or something like that—and then Mr. Ravaud wanted a little time to set up the schedule for the commission I was to receive for whatever business I did in my territory which, of course, was the most important part of the income I was looking forward to receiving. The guarantee was a minimum.

Q. Was any amount of your override fixed at the time you spoke to Mr. Ravaud?

A. No, sir, Mr. Ravaud said that it was impossible for him at that time to give me that schedule but he would go back to New [13] York and he

(Testimony of Ove Fog.)

would refer to it and come back and have it straightened up.

Q. Did you agree with Mr. Ravaud then as to whether or not you were to be employed?

A. Yes, Mr. Ravaud then employed me, and if it was possible for me to be released from my position with Schenley on account of the short notice, he would like me to start on the first of May, which was about eight days ahead. And I told Mr. Ravaud I thought they would release me, which they did.

Q. And you immediately went into the affair as Western Division Manager of Continental Import?

A. Yes, commencing May 1, 1942.

Q. Did you communicate subsequent to that time with Mr. Ravaud relative to your arrangement for commissions?

A. Yes, in, I believe it was, in the very latter part of 1942 I wrote to Mr. Ravaud and asked him if he would be good enough to set up the schedule for my commissions, and Mr. Ravaud called me back and told me that he would work on it and come back to this matter very shortly.

(Mr. tum Suden handed a document to Mr. Farraher.)

Mr. Farraher: No objection.

Q. (By Mr. tum Suden): Mr. Fog, I show you——

The Court: If counsel does not object to it, you do not have to identify it. Is there something you want to call my attention to? [14]

(Testimony of Ove Fog.)

Mr. tum Suden: Yes.

The Court: State the substance of it.

Mr. tum Suden: One of the letters is from Mr. Fog to Mr. Ravaud dated September 21, 1942, making inquiry as to his decision on the question of override, and he received a response to that letter on September 25, 1942. The substance of it is, if that is what the Court wants me to do, that he had been giving the matter consideration and he would communicate with Mr. Fog in a few days, and he expected to be out on the Coast, and at this time he would take up that question. But there is one paragraph here which I would like to read to the Court. It has a bearing on sustaining Mr. Fog's testimony:

“I want you to know how satisfied I am with your work on the Coast. I know the difficulties which you are facing, but I believe, and I am sure you do, that before long we are going to be one of the main factors in the liquor industry. I also want you to know that my organization is going to become bigger with the addition of outstanding agencies. As soon as the volume of business will warrant a larger sales organization, it is my intention to give you more territory to supervise and to let you have the number of missionary men and representatives which our business will then justify.”

Mr. tum Suden: I might offer these in evidence, if the Court please. [15]

The Court: Very well.

(Testimony of Ove Fog.)

(The documents referred to were thereupon received in evidence and marked, respectively, Plaintiff's Exhibits Nos. 1 and 2.)

PLAINTIFF'S EXHIBIT No. 1

[Letterhead]

Continental Import Division
of R. C. Williams & Co., Inc.

September 25, 1942.

Mr. Ove Fog
c/o Parrott & Co.
1929 S. Figueroa Street
Los Angeles, Calif.

Dear Mr. Fog:—

I have received your personal note of September 21st, regarding your own situation, and I perfectly understand your viewpoint.

It is definitely my intention to improve your position with us, and to see that you are adequately compensated for your efforts. I would like to **confirm our gentlemen's** agreement, and you will receive a progressive bonus, which will be a personal inducement for you to better the business in your **territory**.

To be perfectly frank with you, I have to study a possible schedule, and as you know, at this time I am terribly busy with our organization. Therefore, I am asking you to wait a few days, until I

(Testimony of Ove Fog.)

have a chance to concentrate on the subject, and also to consult with my associate.

As far as you and I being protected in our commitments, on account of the possibility of wages being frozen by Washington, you do not have to worry about this. This letter is enough to cover whatever arrangement we will make in the near future.

I want you to know how satisfied I am with your work on the Coast. I know the difficulties which you are facing, but I believe, and I am sure you do, that before long, we are going to be one of the main factors in the liquor industry. I also want you to know that my organization is going to become bigger, with the addition of outstanding agencies. As soon as the volume of business will warrant a larger sales organization, it is my intention to give you more territory to supervise and to let you have the number of missionary men and representatives which our business will then justify.

As soon as we are ready to make shipments of Puerto Rican Rum, I intend to make a trip to the Coast and to see you in San Francisco or in Los Angeles. At this time, I will tell you what I have in mind for you.

Kind regards.

Very truly yours,

By /s/ JEAN RAVAUD,

jr/b

General Manager.

[Endorsed]: Filed Dec. 28, 1948.

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 2

R. C. Williams & Co., Inc.
Continental Import Division
610 Fifth Avenue
New York

Los Angeles, Calif.
September 21, 1942

Memo to: Mr. Jean Ravaud

From: Ove Fog

Now that I have successfully completed the Vodka deal, I have had time to give certain personal matters consideration. The matter I would like to take up with you refers to our gentlemen's agreement that we verbally made during your few days in San Francisco.

As far as I am concerned, and my actions have shown this, I believe, our gentlemen's agreement is of more value to me than a written document, but what I am referring to is that the salary ceilings might interfere with your very best intentions, as long as you have not established a record or agreement.

I am not interested in any change in our stipulated agreement on my salary, but it is of vital importance to me to have a definite arrangement regarding my over-ride on the volume of cases I am doing in my territory, as the income derived from this source is what makes my arrangement with your

(Testimony of Ove Fog.)

good firm attractive, and as it partly depends on my own efforts to be successful (which is also your success) I feel certain that you will solve this problem.

I know that you appreciate my position and I am only writing you at this time concerning this matter so that you can be protected also in your commitments.

Sincerely,

OVE FOG.

OF:er

[Endorsed]: Filed Dec. 28, 1948.

(A document was handed to Mr. Farraher.)

Mr. Farraher: We have no objection to this. We will stipulate that the figures in ink upon the face of it are in the handwriting of Mr. Ravaud.

Q. (By Mr. tum Suden): Mr. Fog, did you subsequently get a schedule of overrides from Mr. Ravaud? A. Yes.

The Court: Is that the document that you have in your hand?

Mr. tum Suden: This is the document.

The Court: You can just read it. I never spend much time on documents if attorneys agreed to them. Just read it. It saves time that way.

Q. (By Mr. tum Suden): I show you this document and ask you if that is the document you received from Mr. Ravaud.

(Testimony of Ove Fog.)

A. That is correct.

Q. Where did you get that?

A. I received that when I met Mr. Ravaud in Los Angeles.

Q. Is that your handwriting?

A. In Los Angeles I received it in November.

Q. What year? A. 1942.

Mr. tum Suden: The ink handwriting on there has been identified as that of Mr. Ravaud. There are some figures. I do not know what they mean, but from the terms, it is on the Continental Import Division of R. C. Williams & Co. letterhead, it is not dated, but it says, "Terms of commissions for Mr. Ove Fog: From 1000 to 5000 cases, ten cents a case."

Q. I assume that is 10 cents, is that right?

A. Yes.

Mr. tum Suden: "From 5,000 to 10,000 cases, 15 cents a case; from 10,000 to 15,000 cases, 20 cents a case; over 15,000 cases, 25 cents a case."

I offer this document in evidence, if the Court please.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 3.)

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 3

[Letterhead]

Continental Import Division
of R. C. Williams & Co., Inc.

Terms of Commissions for Mr. Ove Fog

From 1,000 to 5,000 Cases....	.10 a case
From 5,000 to 10,000 Cases....	.15 a case
From 10,000 to 15,000 Cases....	.25 a case
Over 15,000 Cases.....	.25 a case

[Following figures on original exhibit in ink handwriting.]

500	85
750	52
<u>1000</u> <u>2250</u>	170
	<u>425</u>
	4420
	<u>250</u>
	6920

[In Pencil]

Received Nov., 1942, in L. A., from Mr. Jean Ravaud.

[Endorsed]: Filed Dec. 28, 1948.

Q. (By Mr. tum Suden): Mr. Fog, did you have any conversations with Mr. Ravaud relative to the shipment of liquor into your territory directly by R. C. Williams during the year 1943?

(Testimony of Ove Fog.)

A. Yes, sir.

Q. What was that?

A. When Mr. Ravaud visited out here, it happened that a shipment of rum——

Mr. Farraher: I wonder if we could have the time fixed.

The Court: Yes, you had better fix the time and place.

Q. (By Mr. tum Suden): Can you fix the time and place that that transpired?

A. Well, it would be possible to get the exact date from the [17] invoice that formed the receipt for that shipment. I believe it was probably July, but I am not sure about it. But it is possible to get that exact date, if it is of any consequence.

The Court: 1943?

A. Yes.

Q. The conversation that you are now going to give us a conversation that occurred about July of 1943 after you got this invoice for rum, is that right?

A. No, this shipment I am referring to, Your Honor, there was only one shipment, and it is the date of that invoice. I do not have it.

Q. I understand. I am trying to help you fix the time. The conversation you had with this gentleman was about the time that this shipment of rum was made in July 1943?

A. Yes, that is correct.

Q. Where did you have the conversation? In Los Angeles? A. No, in San Francisco.

(Testimony of Ove Fog.)

Q. Where?

A. Either at the Palace Hotel—I believe in the Palace Hotel—or in the office at San Francisco.

Q. Just the two of you present?

A. Mr. Ravaud and myself.

Q. Now, give the conversation, if that is what you wanted.

Mr. tum Suden: Yes, Your Honor.

A. At that time I learned R. C. Williams had shipped a couple of [18] carloads of rum to a wholesaler here in San Francisco. I called to Mr. Ravaud's attention that that was a direct violation of my arrangement and my general agreement with them because all shipments that came into this territory from R. C. Williams in New York had to go through my office. Mr. Ravaud at that time told me he thought so, too, but he would have to take it up with Mr. Jaburg. Mr. Jaburg is president of R. C. Williams & Company. Mr. Ravaud said he was going back to New York and he would take that matter up with Mr. Jaburg and have it confirmed. Shortly after——

The Court: Just a minute. You have answered the question.

Q. (By Mr. tum Suden): Did you have any further conversation with Mr. Ravaud relative to the shipment of Puerto Rico rum subsequent to the one you have just related?

A. Pardon me. Would you repeat that?

(Question read.)

(Testimony of Ove Fog.)

A. Do you mean with regard to shipments on the Coast?

Q. No, in regard to this shipment of Puerto Rican rum. Was a decision arrived at with regard to that?

A. Yes, the decision was when Mr. Ravaud returned to the Coast shortly after, Mr. Ravaud told me that he had presented the matter to Mr. Jaburg, and he had confirmed that that was a mistake and that that would not happen again, and no merchandise would be shipped out here except through my office from R. C. Williams. [19]

Q. When did you first observe Harwood whisky, or when did you first learn that Harwood whisky was being distributed on the Pacific Coast?

A. In the fall of 1944.

Q. How did you learn that?

A. I learned it on the street from one of our wholesalers there, who told me that Harwood was now available here, and that it was imported by R. C. Williams & Company.

Q. Did you see any bottles at any time?

A. Yes, the next day I went out to pick up a bottle and I saw a bottle.

(Documents were handed to Mr. Farraher.)

Mr. Farraher: We have no objection to their introduction.

Q. (By Mr. tum Suden): Did you communicate with Mr. Ravaud relative to the appearance of Harwood whisky on the Pacific Coast?

(Testimony of Ove Fog.)

A. Yes, I contacted Mr. Ravaud by telephone and told him about it and I wrote to him.

Q. I show you these letters. Are those carbon copies of letters you sent to Mr. Ravaud?

A. Yes.

Mr. tum Suden: I would like to offer these two letters. One is a memorandum with a letter attached. It refers to it. This is dated October 18, 1944, and it is addressed to Mr. Ravaud, and it is a communication from Mr. Fog, characterized as an [20] inter-office correspondence. Briefly, it calls attention to the fact that the Canadian whisky is on the Coast out here and suggests, "It might be to our best interest if I handled the whisky direct just like I handle the Puerto Rican rum," and the yellow copy attached to it. There is one paragraph in there which I would like to read to the Court:

"When I talked to you about R. C. Williams & Co.'s wholesale liquor division offering merchandise out here such, for instance, as they did with the Puerto Rican rum to Millet & Co., you informed me that you had straightened that situation up and that the wholesale division would in no way whatsoever offer merchandise to the West Coast."

That was a letter addressed to Mr. Ravaud. I offer that in evidence.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 4.)

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 4

Inter-Office Correspondence
R. C. Williams & Co., Inc.
Continental Import Division
610 Fifth Avenue

San Francisco, Calif.

October 18, 1944.

Memorandum to: Mr. Jean Ravaud

From: Mr. Ove Fog

I have given a copy of the attached letter concerning the Canadian Whiskey to Mr. Schumacher, as he wanted to know what I was writing you. I should like meanwhile in this letter, just as a closed message to you, to mention that in case your division is going to handle the Canadian Whiskey it might be to our best interest if I handled the whiskey direct just like I handle the Puerto Rican Rum, as this would bring Williams Importers' name to the foreground and solidify our position.

I believe it would be possible for you to do this if you took the stand that there was not enough profit to leave a commission to Parrott & Co. On the other hand we, of course, would give Parrott & Co. the first right to purchase whatever merchandise is available.

This is just a thought that came to me that you

(Testimony of Ove Fog.)

might like to take into consideration for your final decision if matters develop favorably for you.

OVE FOG.

OF:vh

San Francisco, Calif.

October 18

Memorandum to: Mr. Jean Ravaud

From: Mr. Ove Fog

Re Canadian Whiskey Distributed by R. C. Williams & Co., Inc.

I confirm my telephone conversation with you of today and have before me a copy of Parrott & Co.'s letter of today to you confirming their wire, also of today. This letter is self-explanatory and you will understand how damaging this situation is to the prestige and policy of R. C. Williams & Co., Inc. It is not very often that Mr. R. J. Menzies takes drastic steps, but inasmuch as he has always valued R. C. Williams & Co.'s integrity very highly, I feel that this situation was quite a shock to him.

I learned early this morning that Tonkin Distributing Co. had bought one carload of this whiskey and was ready to open up letter of credit, and I also learned that Harry Tonkin—who is the manager of Levi Zentner & Co., and handles their different liquor divisions in Sacramento, Reno and Santa Rosa through Mr. Suskin, whom I know as being formerly connected with Lyons & Co. selling their

(Testimony of Ove Fog.)

domestic cordials etc. but now is free-lancing and evidently dabbling in all kinds of merchandise he can put his hands on—bought one car of whiskey with the understanding that Mr. Suskin was to receive \$1.00 per case from him as his commission, which later was cut down to 50c per case. To have R. C. Williams & Co.'s merchandise offered on the market in such a manner is, in my opinion, most detrimental to the interests of our firm.

When I talked to you about R. C. Williams & Co.'s wholesale liquor division offering merchandise out here such, for instance, as they did with the Puerto Rican Rum to Millett & Co., you informed me that you had straightened that situation up and that the wholesale division would in no way whatsoever offer merchandise to the West Coast.

From our telephone conversation, you will understand that we have the information that R. C. Williams & Co. by telephone has confirmed to the firm of The Joseph Abrams Co. and accepted the sale of four carloads of the above mentioned whiskey, and I only hope that by the time you receive this information you will be able to have this confirmation voided. I know you will understand how important it is for Parrott & Co. and for me at this time to be able to offer some whiskey to the trade for the purpose of helping us sell the rest of our lines, such as Rums and Corgo Port, which at this time as you know are hard to sell.

I feel quite sure you will appreciate my position

(Testimony of Ove Fog.)

in this matter and I shall be looking forward to hearing from you at your first opportunity.

OVE FOG.

OF:vh

[Endorsed]: Filed Dec. 28, 1948.

Mr. Farraher: We admit the authenticity of the document. No objection to its admission.

Q. (By Mr. tum Suden): Mr. Fog, I show you an interoffice correspondence dated October 20, 1944, from Mr. Ackerman to you and ask you if you recognize that document. A. I do.

Q. Who is Mr. George Ackerman?

A. George Ackerman was considered, I believe, assistant manager of the Continental Import, if that was his title. He was anyway [21] Mr Ravaud's assistant.

Mr. tum Suden: If the Court please, I would like to offer this document in evidence. It is an interoffice communication with an attached memorandum. I would like to read a portion of it.

The Court: Very well.

“Memorandum to Mr. Ove Fog from Mr. George M. Ackerman:

“The attached, in addition to giving you the terms and conditions of the sale of Harwood whisky, serves as the sample of a letter we propose to send to all of our distributors. If you

(Testimony of Ove Fog.)

wish me to send this letter to any of the distributors in your territory, please advise."

And the pertinent portion is as follows:

"Several of our distributors have written to us about Harwood Canadian whisky, as R. C. Williams' name appears on this bottle as the sole United States——" and then comes the word "distributor," which is stricken out in ink and then word "importer" is written in in ink.

"Actually, our company has had nothing to do with the sales representation of this item. All sales were made by representatives of the distillery and at their terms. As a service to the Canadian distillery, R. C. Williams & Co., Inc., 265 Tenth Avenue, New York City, merely cleared all United States sales for them, and served as a wholesaler in New York City for this product." [22]

And then follow the terms referring to a 30-day letter of credit and so on. I offer this document in evidence.

(The two documents referred to were thereupon received in evidence and marked Plaintiff's Exhibit No. 5.)

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 5

Inter-Office Correspondence
R. C. Williams & Co., Inc.
Continental Import Division
610 Fifth Avenue
New York

[Stamped]: Oct. 23, Rec'd.

October 20th, 1944.

Memorandum to: Mr. Ove Fog

From: Mr. Geo. M. Ackerman

The attached, in addition to giving you the terms and conditions of the sale of Harwood Whiskey, serves as the sample of a letter we propose to send to all of our distributors. If you wish me to send this letter to any of the distributors in your territory, please advise.

/s/ GEO.

(George M. Ackerman)

Dear.....,

Several of our distributors have written to us about Harwood Canadian Whiskey, as R. C. Williams' name appears on this bottle as the sole United States distributor importer.

Actually, our company has had nothing to do with the sales representation of this item. All sales were made by representatives of the distillery, and at

(Testimony of Ove Fog.)

their terms. As a service to the Canadian distillery, R. C. Williams & Co., Inc., 265 Tenth Avenue, New York City, merely cleared all United States sales for them, and served as a wholesaler in New York City for this product.

We, at Williams Importers and R. C. Williams & Co., Inc., do not want our distributors to feel that we have neglected you, or forgot about you for one minute, by not offering this whiskey to you. We simply did not have the authority to do so. In several instances, this has caused us some embarrassment, and we explained this to the distillery. Therefore, they have agreed to honor our recommendations in accordance with their ability to deliver, and still in accordance with their terms, which are as follows:—

1. Price: The price of Harwood's is \$20.77 per case F.O.B. Vancouver, British Columbia, Canada—In Bond. This price is lower than the ceiling price permitted by the Office of Price Administration under special order.

2. Terms: 30 days irrevocable letter of credit opened in our name payable through the Chase National Bank, Importers and Traders Branch, Worth and Church Streets, New York City.

3. Documents: Bills of lading—no other documents necessary in view of our being the importer and warehouse entry is made in our name.

4. Shipments: Shipments to be made in carload lots, 1600 to 1750 cases per car.

(Testimony of Ove Fog.)

5. Please advise us of your interest one way or the other. Please also keep in mind that as we do not control the sales of this item, we cannot guarantee exclusive representation to you.

We do not know your position on whiskey, nor are we attempting to sell this whiskey to you; only because of the inquiries sent to us have we asked the distillery to consider the desires of our friends and customers.

All of our regular items are, of course, handled in the usual way and at our regular terms.

Sincerely yours,

[In pencil.]

Irrevocable credit payable at sight good for 30 days.

[Endorsed]: Filed Dec. 28, 1948.

Mr. Farraher: This may be offered without objection.

Q. (By Mr. tum Suden): Mr. Fog, I show you a document and ask you if you recognize that document.

A. Yes, I do. That is a letter from Mr. Ravaud to me.

Q. And that was in answer to your letter with regard to the distribution of Harwood whisky on the Pacific Coast territory?

A. That is right.

(Testimony of Ove Fog.)

Mr. tum Suden: If the Court please, I have here a letter dated October 21, 1944, from Mr. Jean Ravaud to Mr. Ove Fog, the subject "Canadian Whisky." May I read a portion of it?

The Court: Very well.

Mr. tum Suden: He states:

"I have received your memorandum of October 18 regarding the question of the Canadian whisky distributed by R. C. Williams, and no doubt you have received a letter of explanation from Mr. Ackerman on the subject."

"That is that document that you have right here.

"I would like to confirm, however, that we had a long meeting with Mr. Jaburg, Mr. Koerner, and George Ackerman and myself after the reception of the telegram and the letter from Oscar. By telephone I explained the situation to you, which is as follows:

" 'R. C. Williams wholesale Department have the exclusive franchise of this whisky for New York, provided that they accommodate the Canadian distillers by clearing the merchandise for them and doing the billing in the United States. This is exactly what has happened, for as a matter of fact, Koerner has nothing to do with the sales which are made by representatives of the U.D.L. Distilleries in Vancouver. For this reason, and as the letters of credit have already been opened, it is absolutely impossible to cancel the sales already made in Northern California.' "

(Testimony of Ove Fog.)

And it refers to sales. I do not think it is necessary to ready any more unless the Court desires me. There is one portion towards the end:

“As you know, we are not making any money at all on the Canadian whisky and outside of a moral obligation, I have been glad to obtain this merchandise for Parrott & Co., having in mind that they will use this whisky to push our other items.”

I offer that document in evidence, if the Court please.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 6.)

PLAINTIFF'S EXHIBIT No. 6

Inter-Office Memorandum
New York

[Stamped]: Oct. 23, Rec'd.

October 21, 1944.

To: Mr. Ove Fog

From: Mr. Jean Ravaud

Subject: Canadian Whisky

I have received your memorandum of October 18th regarding the question of the Canadian Whiskey distributed by R. C. Williams, and no doubt, you have received a letter of explanation from Mr. Ackerman on the subject.

(Testimony of Ove Fog.)

I would like to confirm, however, that we had a long meeting with Mr. Jaburg, Mr. Koerner and George Ackerman and myself after the reception of the telegram and the letter from Oscar. By telephone, I explained the situation to you which is as follows:

R. C. Williams Wholesale Department have the exclusive franchise of this whiskey for New York, provided that they accommodate the Canadian Distillers by clearing the merchandise for them and doing the billing in the United States. This is exactly what has happened, for as a matter of fact, Koerner has nothing to do with the sales which are made by representatives of the U.D.L. Distilleries in Vancouver. For this reason, and as the letters of credit have already been opened, it is absolutely impossible to cancel the sales already made in Northern California. As no sales were made in Southern California, we used as much pressure as possible, with the help of Mr. Jaburg, and it has been agreed that no other people will be sold in Southern California except Parrott & Co.

As I told you on the telephone, if you think it is going to considerably help us if we sell some of that whiskey to Bohemian, you can very well do so. The most important angle of this proposition is that it reflects the market conditions. As you know, this Canadian Whiskey is an expensive item and there is no doubt in my mind that if customers could obtain the whiskey they want from the Ameri-

(Testimony of Ove Fog.)

can distillers, as well as Scotch and other cheaper Canadian whiskies, they would not show any anxiety to purchase this rather expensive product.

This situation is the same all over the country and we have indications on the Eastern market that retailers who were indulging in special sales on Rum, are now raising the price of the rum. I feel that in the near future we are going to go through another emergency period, probably not as acute as the one of 1943 and the beginning of this year, but an important one.

For your information, I have today received a circular letter from the Council of the Greater New York Wholesale Liquor Dealers Assoc. which is quite interesting and mentions: "It is my opinion, based upon conferences with various groups in the industry that merchandise will be fairly scarce between now and the end of the year. Therefore, I recommend that with a full knowledge of conditions proper merchandising of additional quantities of rums, brandies and cordials, other than Scotches and Whiskies, should be undertaken now."

This is based on the fact that the whiskey in production in August was rather disappointing and that it is very doubtful if the Government is going to declare another whiskey holiday in December. I would like you to call this to the attention of Parrott and our main distributors, and see that they are not going to be without rum or brandy, which undoubtedly is going to be very much in demand before Christmas.

(Testimony of Ove Fog.)

As you know, we are not making any money at all on the Canadian Whiskey and outside of a moral obligation, I have been glad to obtain this merchandise for Parrott & Co., having in mind that they will use this Whiskey to push our other items.

As you also know, we have a considerable amount of merchandise in our warehouses—Rum, Brandy and Port, and I hope that they will take advantage of the Canadian Whiskey they are going to receive, to push the sales of our specialties on a substantial basis.

/s/ JEAN.

(Jean Ravaud.)

C.C. Mr. Ackerman.

jr/b

[Endorsed]: Filed Dec. 28, 1948.

Mr. Farraher: I have no objection to the introduction of the document just handed me.

Q. (By Mr. tum Suden): I show you a letter dated October 27, [24] 1944, from Mr. Ackerman to yourself and ask you if you recognize receiving that.

A. Yes, sir.

Mr. tum Suden: This is a letter from Mr. Ackerman to Mr. Fog, and there is just one phrase I would like to call the Court's attention to here. It says:

"I talked to Mr. Koerner today, and he ad-

(Testimony of Ove Fog.)

vised me that he had received a letter from Parrott & Co., complaining about the terms on the Harwood whisky.

“Please believe me, Ove, when I tell you that the terms are identically the same to all customers. Also please point out that we have nothing to do with the setting of the terms, any more than we had anything to do with the sale of the whisky.

“Obviously, if we were handling this item, the terms of payment would be the same as the terms of payment on all of our other merchandise.” He discusses the effect of the sale of Harwood whisky on wholesale sales.

The Court: This was, of course, during the time that OPA price ceilings were in effect?

Mr. Farraher: That is right.

The Court: You are getting into a field, gentlemen, in which the Federal Courts have had considerable experience. I noticed in one of the letters here the whisky was regarded as maybe being of some help in moving the rum and other products on the market. That has nothing to do with this case, but I have some familiarity with the so-called tie-in sales which reached the Federal Courts in one form or another during the OPA days.

I would like to inquire of counsel whether the amounts received by the defendant in the sales of Harwood whisky are the subject of the complaint of the plaintiff here.

(Testimony of Ove Fog.)

Mr. tum Suden: The amount received by the defendant?

The Court: No, I mean, is it the plaintiff's complaint that he would have received commissions on the sales of the Harwood whisky had he known about those sales at the time?

Mr. tum Suden: Yes.

The Court: I mean, it is the specific Harwood whisky that came from the distillers——

Mr. tum Suden: The Harwood whisky.

The Court: That came from Canada, and that was handled in the manner described in this letter by the defendant. That is the subject matter of the controversy?

Mr. tum Suden: Commission on the Harwood whisky. In brief, their explanation to Mr. Fog was always that they did not handle it, they had nothing to do with it, and therefore he was not entitled to his commission on that whisky, althought they had assured him whatever was sent him in this territory by R. C. Williams would be sent in through the Continental Import and he would be getting his commission on it. Instead of that, they [26] sidetracked the Continental Import and sent the whisky in here.

Mr. Farraher: That is definitely a matter of dispute, if Your Honor please.

The Court: What you just said is not quite clear to me, Mr. tum Suden.

Mr. tum Suden: The point is, Mr. Ravaud employed Mr. Fog, he told him R. C. Williams had

(Testimony of Ove Fog.)

set up this Continental Import Division to handle the national distribution of liquors in the United States, whatever they imported, and he assured him any liquor set out by R. C. Williams, as distinguished from Continental Import, would go through Continental Import Division, go through his division, and he would get his commission on all liquor sent out here by R. C. Williams.

The Court: That I understand, but I gathered from these letters it was the position of the defendant that they did not sell this liquor.

Mr. tum Suden: That is just it. That is why I am introducing these documents. They have always maintained to Mr. Fog that they did not ship it out here, they had nothing to do with the sales, they made no money on it; they only handled it as a matter of accommodation to the distillery in consideration of their getting the wholesale privileges for the metropolitan area of New York.

The Court: I gather from their letters they say, "We did not make these sales. We are billing this merchandise for the [27] Canadian outfit, for which we are making some charge. Sales are made by someone else, made by the distiller or some representative of the distiller. Therefore, it not being a sale, you are not entitled to any commission on that."

Mr. tum Suden: That is the position they take.

The Court: Rather than making any distinction between the export division and the import division and R. C. Williams Company.

(Testimony of Ove Fog.)

Mr. tum Suden: But as a matter of fact, we will show——

The Court: Your contention is that actually there were sales made, and the defense is attempting to avoid its obligation by saying the sales were made by R. C. Williams rather than by the Import Division; is that your position?

Mr. tum Suden: That is part of my position, but they contend they had nothing to do with the sales and they did not handle this liquor.

The Court: I am just trying to follow the testimony.

Mr. tum Suden: I would like to get it clear in Your Honor's mind.

Mr. Farraher: May I call Your Honor's attention to other letters introduced here, where the word "we" was used:

"We do not handle,"

and Your Honor will recall that those are employees of the division and not of the main company itself. So the "we" is not Williams & Company. [28]

The Court: Maybe we can save some time. Do you dispute that the R. C. Williams & Company made sales of the Harwood Canadian whisky in this territory?

Mr. Farraher: Our position is that they made a contract with the distillery that they would be the importers of all the Harwood whisky to be distributed in the United States by this Canadian distillery, that they were to receive for it \$1.60 a case,

(Testimony of Ove Fog.)

that they were to get a regular commission on the sales according to the OPA regulations, on the sales in New York, but elsewhere they received just \$1.60 a case, and they were required to pay 60 cents on that to the agents who made the sale, and the agents were the agents selected by the distiller, for the reason that the distillery wanted to keep up its old customers, since there was a scarcity of whisky, instead of letting another company have it.

The Court: Then the defendant contends it did not make any sales at all.

Mr. Farraher: That is right. It made no direct sales.

The Court: That is what I mean, that it made no sales, that it was getting paid for the service it rendered in distributing, billing and distributing.

Mr. Farraher: That is right.

The Court: That it actually made no sales at all?

Mr. Farraher: That is right.

The Court: Your position is there were no sales made. [29]

Mr. Farraher: That is right.

The Court: It makes no difference whether that is the Import Division or the R. C. Williams & Company.

Mr. Farraher: That is true, except that I wanted to call attention to the fact that some of these letters say, "We earned no money from this."

(Testimony of Ove Fog.)

The Court: You mean the Import Division made no money from it?

Mr. Farraher: Yes, that is what I want to call the Court's attention to.

The Court: But if we make no distinction between the Import Division and R. C. Williams & Company and treat it as one, it is still your position that there is no liability because the defendant did not make any sales.

Mr. Farraher: Yes, that is right, if Your Honor please, and that is the position taken in the dispute, which finally ripened into the settlement, which is pled by the plaintiff himself in the complaint. That was our side of the dispute. His was the opposite side.

The Court: I am commencing to see what the issues are.

Mr. tum Suden: Our position is, if the Court please, that they did import this Harwood whisky, and under their contract with Mr. Fog they shipped it into this territory regardless of how the sales were made.

The Court: Your position is, irrespective of whatever the [30] arrangement was, the plaintiff being the sole representative of the defendant here on this Coast, is entitled to so much per case for all this whisky that was handled, irrespective of the method of handling it by the defendant. That is your position.

Mr. tum Suden: That is right, yes. They had

(Testimony of Ove Fog.)

an agreement that they would ship nothing in here except through his division and they imported it at one price and sold it at another.

The Court: All right. Now the defendant says that that dispute did exist and we settled it. We paid them \$10,000. And your position is that that dispute was settled, it is true, but it was settled on the basis of some representation which you subsequently discovered was not correct.

Mr. tum Suden: That is right.

The Court: We understand each other now as to what dispute it was that was settled or attempted to be settled.

Mr. tum Suden: Yes.

The Court: I think we will take a five-minute recess.

(Recess.) [31]

Tuesday, December 28, 1948

(During the trial of the above-entitled cause, the following occurred during examination of witness Ove Fog:)

Mr. Farraher: We have no objection to the introduction of the document in evidence, your Honor.

Q. (By Mr. tum Suden): I show you a letter dated December 19, 1944 (handing to witness), by Mr. Ackerman to yourself, and ask you if you recognize that? A. Yes, sir. [32]

Mr. tum Suden: This is a letter from Mr. Ack-

(Testimony of Ove Fog.)

erman to Mr. Fog, in response to a letter by Mr. Fog to Mr. Ravaud, on the subject of Harwood whisky, a portion of which I would like to call to the court's attention, as to the following paragraph:

"I believe you like this item as well as I do, especially the way it is being handled, but I have learned that Irving Koerner is definitely in charge of shipments from the distillery.

"Therefore, in the future, Mr. Menzies or any of your other good customers who want any information on Harwood whisky, should contact Irving Koerner at 265 Tenth Avenue, as I understand the distillery only ships after getting a final O.K. from Mr. Koerner."

Q. Now, Mr. Fog, who was Mr. Koerner?

A. Mr. Koerner is the manager of the wholesale liquor division of the R. C. Williams & Company.

Q. And this office at 265 Tenth Avenue is the office of the R. C. Williams Company?

A. That is correct.

Mr. tum Suden: I offer this in evidence.

The Clerk: Exhibit 8.

(Whereupon letter dated December 19, 1944, referred to above, was received in evidence and marked Plaintiff's Exhibit 8.) [33]

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 8

[Letterhead] Continental Import Division of R.
C. Williams & Co., Inc.

December 19, 1944.

Memo to: Mr. Ove Fog

From: Mr. Geo. M. Ackerman

I have your letter of December 15th, addressed to Mr. Ravaud, on the subject of Harwood Whiskey.

I believe you like this item as well as I do, especially the way it is being handled, but I have learned that Irving Koerner is definitely in charge of shipments from the distillery.

Therefore, in the future, Mr. Menzies or any of your other good customers who want any information on Harwood Whiskey, should contact Irving Koerner at 265 Tenth Avenue, as I understand the distillery only ships after getting a final O.K. from Mr. Koerner.

/s/ GEO.

(George M. Ackerman.)

[Endorsed]: Filed Dec. 28, 1948.

Mr. Farraher: Could I have that last answer, please? I didn't catch it. May I have it read, your Honor?

The Court: Yes, please read that.
(Record read.)

(Testimony of Ove Fog.)

Q. (By Mr. tum Suden): Mr. Fog, did you continue to correspond with Mr. Ravaud and others at Continental Import Division or the R. C. Williams, in regard to the Harwood shipments into your territory?

A. Yes, I did.

Q. From time to time?

A. From time to time.

Q. I see.

(Mr. tum Suden thereupon presented a document to Mr. Farraher for his examination.)

Mr. Farraher: We have no objection to the introduction of this document counsel just handed us.

Q. (By Mr. tum Suden): I show you a letter of February 2, 1945, from yourself to Mr. Jean Ravaud, and ask you if you recall sending that letter (handing to witness)?

A. Yes, sir.

Mr. tum Suden: If the Court pleases, this is a letter—I will not read the entire thing—in which Mr. Fog reminds Mr. Ravaud, or complains about the shipping of Harwood whisky into his territory, and reminds Mr. Ravaud to the effect that “Meanwhile, I am convinced that profits are made on the dealings [34] of Harwood’s whisky sent to my territory, and I understand not by Williams Importers, but by R. C. Williams & Company, and inasmuch as I have been guaranteed that R. C. Williams & Company’s wholesale division in New York will not operate directly in this territory, but that transactions concerning sales of liquor would go through this office, it seems logical to me that I am entitled

(Testimony of Ove Fog.)

to commission even if Williams Wholesale Division does not want to take advantage of my services but prefer to handle sales through outside channels, thereby eliminating my rights of livelihood.”

In other words, I simply wanted to point out that he stressed the terms of his original contract.

I offer this in evidence.

The Clerk: No. 9.

(Whereupon letter dated February 2, 1945, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 9.)

PLAINTIFF'S EXHIBIT No. 9

Inter-Office Correspondence

R. C. Williams & Co., Inc.

Continental Import Division

610 Fifth Avenue

New York

San Francisco, Calif., February 2, 1945.

Memorandum to: Mr. Jean Ravaud

From: Mr. Ove Fog

I am enclosing a copy of a letter that Alvin Vincent of Duffield Distributing Co. in Los Angeles, sent to R. C. Williams & Co. in New York, and of which Parrott & Co. in San Francisco, received a copy. From this letter you will understand that it was accidental that I happened to know anything

(Testimony of Ove Fog.)

about that R. C. Williams & Co. were sending an additional four cars of Harwood's Whiskey to Los Angeles. As I do not get any copies of R. C. Williams correspondence from New York to customers in my territory, I am not in a position to know of anything that is going on except through gossip. I happened to know from my last visit in Los Angeles and when Parrott & Co. in Los Angeles received the first three or four cars of Harwood's Whiskey, that they did not use this merchandise for good distribution of Williams Importers different items. On account of that Harwood's Whiskey is handled outside of my office, I have no way of using any kind of diplomacy that would serve our company's interests.

The main reason I am sending you the copy of this letter that Alvin Vincent wrote to Mr. Koerner, is because if Mr. Koerner is giving Parrott & Co. an exclusive on Harwood's Whiskey in the Southern territory, it is most harmful to my connections with firms like Bohemian Distributing Co. and Simon Levi & Co., in case they should want to have some of this whiskey, and I greatly resent that working conditions for the good of our mutual interests are wrecked by actions within the ranks of our own company, as I must expect representing a fine firm like Williams Importers, i.e., R. C. Williams & Co., that they will live up to their traditions of a high grade of ethical operations and protect their men in the field and by doing so also work for the good of their own interests. I do not

(Testimony of Ove Fog.)

understand why you do not feel obligated to support me in my claim for commission on Harwood's Whiskey shipped into my territory. From this side, it looks to me that it would be against R. C. Williams & Co.'s traditions to have an office in a territory that has been guaranteed that all liquor dealings outside of the metropolitan area, for my territory, go through this office, can allow dealings by which some outsider located in my territory obtain commission or benefits while no consideration is given to your men in this territory. From our early correspondence about Harwood's Whiskey, I was given the impression that there was no profit in such transactions, in which case it was a matter of courtesy from this side and good team work to cooperate. Meanwhile, I am convinced that profits are made on the dealings of Harwood's Whiskey sent to my territory and I understand not by Williams Importers, but by R. C. Williams & Co., and inasmuch as I have been guaranteed that R. C. Williams & Co.'s Wholesale Division in New York will not operate directly in this territory but that transactions concerning sales of liquor would go through this office, it seems logical to me that I am entitled to commission even if Williams Wholesale Division does not want to take advantage of my services but prefer to handle sales through outside channels, thereby eliminating my rights of livelihood.

If the bottles and shipments were not marked

(Testimony of Ove Fog.)

“Imported by R. C. Williams & Co.,” the whole matter would have been of no consequence at all and would not interfere with my business generally, but as this is a fact I believe my point is justifiably well taken. I furthermore feel that if you can convince R. C. Williams Wholesale Division that they have to pay me a commission, they might just as well deal through this office and by doing so the situation would be half-way solved and then the Harwood’s Whiskey would be used for the good of Williams Importers’ items.

During our conversation in Chicago, I was of the opinion that Mr. Hugo Jaburg would try and straighten up this situation. If you are of the opinion that nothing will be done, will you kindly inform me and I shall consider the intollerable situation of Harwood’s Whiskey closed.

OVE FOG.

OF:vh

Enclosure

[Endorsed]: Filed Dec. 28, 1948.

(Mr. tum Suden then presented a document to Mr. Farraher for his examination.)

Mr. Farraher: No objection to that document being received in evidence.

Q. (By Mr. tum Suden): I show you a letter dated February 3, 1945, from Mr. Ravaud to your-

(Testimony of Ove Fog.)

self, and ask you if you received that letter (handing to witness). A. Yes, sir. [35]

Mr. tum Suden: If the Court please, this refers to a letter from Mr. Fog under date of January 31, regarding Harwood whisky, and it recites:

“We had a meeting this morning with Mr. Ja-burg, George Ackerman, and Mr. Koerner, and a decision is going to be taken early next week. We will let you know immediately what the entirely new policy is going to be, which we hope will take place regarding the sales of Harwood in your territory.”

We offer this in evidence.

The Clerk: Exhibit 10.

(Whereupon letter dated February 3, 1945, referred to above, was then received in evidence and marked Plaintiff's Exhibit 10.)

PLAINTIFF'S EXHIBIT No. 10

Inter-Office Correspondence
R. C. Williams & Co., Inc.

Continental Import Division
610 Fifth Avenue

New York, February 3, 1945.

Memorandum to: Mr. Ove Fog

From: Mr. Jean Ravaud.

I received your letters of January 31st regarding the Harwood Whiskey. We had a meeting this

(Testimony of Ove Fog.)

morning with Mr. Jaburg, George Ackerman and Mr. Koerner, and a decision is going to be taken early next week. We will let you know immediately what the entirely new policy is going to be, which we hope will take place regarding the sales of Harwood, in your territory.

Anyway, Mr. Koerner gave us the confirmation that in the month of February, four cars would be shipped to Parrott, two to Los Angeles and two to San Francisco.

As far as Sierra is concerned, we will see that they get a car, but we cannot possibly advance the taxes on this shipment. Therefore, Sierra will have to find a way to have it tax paid. If they can do this, we will see that they get the car.

/s/ JEAN.

(Jean Ravaud.)

jr/b

[Endorsed]: Filed Dec. 28, 1948.

Q. (By Mr. tum Suden): I will show you a letter dated February 6, 1945, from Mr. George Ackerman to yourself. Do you recognize that, and do you remember having received that document (handing to witness)? A. Yes, sir.

Mr. tum Suden: If the Court pleases, this is a letter from George Ackerman to Mr. Fog, and the substance of it is that Mr. Ackerman reports that the response to Mr. Fog's letter of February 2nd,"

(Testimony of Ove Fog.)

as well as the attached copy of Mr. Vincent's letter to Irving Koerner, have been turned over to me, as I have made it my business to run down this Harwood situation [36] to the very last detail, in an effort to get the picture straightened out to our mutual satisfaction."

He says he had a long meeting with Mr. Koerner and Mr. Jaburg "last Friday on this subject. I explained your situation * * * was intolerable * * *."

He stated:

"I made it clear, in asking for control of Harwood whisky sales and distribution policies, that we are not interested in one penny of commission any place in the United States, and contrary to what you state in your letter, and to what you stated in Chicago, R. C. Williams & Company and any or all of its divisions, do not make more than \$1 per case on all of the Harwood that is sold, except on that amount of whisky which is wholesaled here in New York City.

"It is true that other agents, hired by UDL, are paid by R. C. Williams, as that is the law as long as our name appears on the bottles. However, this money originally comes from UDL."

"No matter what the outcome is, please forget about your commission arguments on this whisky. It is definitely impossible, and it weakens my position if I state that in addition to

(Testimony of Ove Fog.)

control of the item, we want commission for one of our representatives.”

I will offer that document in evidence. [37]

Mr. Farraher: Does the court understand? We might have the witness testify what the initials UDL mean.

Q. (By Mr. tum Suden): Who is UDL, Mr. Fog?

A. I think that Mr. Jacobs might answer that question.

The Court: Is that the Canadian Distillery?

Mr. Farraher: That is the name of it, yes—United Distilleries Limited.

The Witness: Yes, United Distilleries Limited.

Mr. tum Suden: Is this No. 11?

The Clerk: No. 11, yes.

(Whereupon letter dated February 6, 1945, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 11.)

PLAINTIFF'S EXHIBIT No. 11

[Letterhead] Continental Import Division of R. C. Williams & Co., Inc.

February 6th, 1945.

Memo to: Mr. Ove Fog

From: Mr. Geo. M. Ackerman

Your letter of February 2nd, addressed to Mr. Ravaud, as well as the attached copy of Mr. Vin-

(Testimony of Ove Fog.)

cent's letter to Irving Koerner, have been turned over to me, as I have made it my business to run down this Harwood situation to the very last detail, in an effort to get the picture straightened out to our mutual satisfaction.

We had a long meeting with Mr. Koerner and Mr. Jaburg last Friday on this subject. I explained your situation, as well as Mac's in Chicago, as well as others throughout the country, and pointed out that the situation was intolerable insofar as the functions of our Division were concerned.

Mr. Jaburg took a very definite stand, indicating that the desires of our Division had to be satisfied, or the Harwood situation would have to end.

I made it clear, in asking for control of Harwood Whiskey sales and distribution policies, that we were not interested in one penny of commission any place in the United States, and contrary to what you state in your letter, and to what you stated in Chicago, R. C. Williams & Company, and any or all of its Divisions, do not make more than \$1.00 per case on all of the Harwood that is sold except on that amount of Whiskey which is wholesaled here in New York City.

It is true that other agents, hired by U. D. L., are paid by R. C. Williams, as that is the law as long as our name appears on the bottles. However, this money originally comes from U. D. L.

In other words, what I am trying to do is to offer to U. D. L. our sales organization at no cost whatso-

(Testimony of Ove Fog.)

ever, and to have their special agents stay home and collect their commission checks just as long as we can control the entire sales and distribution of this item as long as the R. C. Williams name appears on the bottle.

No matter what the outcome is, please forget about your commission arguments on this Whiskey. It is definitely impossible, and it weakens my position if I state that in addition to control of the item, we want commission for one of our representatives.

I have been given to understand today that these conditions have already been set forth to Mr. Klein, the head of U. D. L., and he is going to render a decision upon his return from Vancouver, which will be in three weeks.

I also wired you today, concerning Sierra Wine & Liquor. Mr. Koerner will be glad to accept their order, but it has to be under the regular terms with which Parrott & Company are acquainted—namely, Letter of Credit on an In Bond shipment.

We definitely cannot get involved in tax paying merchandise, but I can imagine that certainly Sierra can make some arrangements to have it tax paid en route, or through some other company, such as Parrott, with whom they work.

If this is agreeable to them, have them follow the necessary steps of opening their letter of credit in accordance with the instructions that Parrott already have in their files, and their order will be accepted for delivery as soon as possible.

(Testimony of Ove Fog.)

Therefore, other than the Sierra situation, please forget all about Harwood Whiskey, until I have the pleasure of writing to you again on this subject, after a definite decision has been taken.

/s/ GEO.

(George M. Ackerman.)

[Endorsed]: Filed Dec. 28, 1948.

(Mr. tum Suden then presented a document to Mr. Farraher for his examination.)

Mr. Farraher: We will stipulate that the document just showed us was taken and delivered, and that it may be introduced in evidence.

The Court: Very well. Counsel has stipulated this document was sent and received, and may be admitted in evidence.

Mr. tum Suden: All right, your Honor. Are we to identify it?

The Court: It is not necessary, he has already stipulated to it.

Mr. tum Suden: This is a letter, if the Court pleases, [38] in which Mr. Fog writes to Mr. Ravaud and sets forth his complaint on the sale of Harwood Whisky. It is a long letter, and——

The Court: What is the date of it?

Mr. tum Suden: February 13, 1945.

It sets forth his position, quoting from some of his prior letters. The substance of it is that he was

(Testimony of Ove Fog.)

informed that Williams & Company makes nothing on the sale of Harwood whisky, and he quotes from one of the prior letters, or the letter from Mr. Ackerman, I believe it is, that they state that they made not more than \$1 a case. I don't know if you would care to have me read this.

The Court: Well, you may do what you feel best.

Mr. tum Suden: I would like to have the court aware of the content of the letter. That is why I am offering it in evidence. Perhaps I had better read it.

The Court: Well, this is the plaintiff's point of view with respect—still being asserted—to the sale of the Harwood whisky?

Mr. tum Suden: Yes, your Honor.

It says (reading):

“Memorandum to: Mr. Jean Ravaud

Dear Jean:

“I have received a letter from your office written by George Ackerman dated February 6th, and I have acknowledged [39] receipt of this letter to George, informing him I consider it proper to comment on this letter direct to you. My reason for wanting to address my letter direct to you I am sure you will understand, is due to the nature of the matter, inasmuch as same concerns my working arrangement with you and also I consider this occasion timely for me to have my position clarified.

(Testimony of Ove Fog.)

“I believe you should know by now where you stand with me insofar as my loyalty to the best interests of the organization which I represent. I should be more than glad and consider it a privilege to string along with any necessary arrangement when the going is tough, and take a genuine satisfaction in accepting the good with the bad where it would serve a called-for purpose, but I surely feel such thinking should work both ways, and I would now like to know where I stand, insofar as the protection my principals are prepared to give their men in the field.

“It seems I am again, within a short period of time, placed in the position of differing in views in the matter concerning my remuneration, but I cannot feel you would have more respect for the man who would take this lying down. This naturally becomes a pretty personal matter, and one I do not take pleasure in going into, but after all a man's livelihood is a pretty personal matter and he is likely to feel keenly about it.

“As an introduction, and to be sure that we understand each other on the subject concerned, I shall refer to the letter I wrote to you on February 2, from which I shall quote as follows:

“‘The main reason I am sending you the copy of this letter that Alvin Vincent wrote to Mr. Koerner, is because if Mr. Koerner is giving Parrot & Company an exclusive on Harwood's whisky in the southern territory, it is most harmful to my con-

(Testimony of Ove Fog.)

nection with firms like Bohemian Distributing Company and Simon Levi & Company, in case they should want to have some of this whisky, and I greatly resent that working conditions for the good of our mutual interests are wrecked by actions within the ranks of our own company, as I must expect representing a fine firm like Williams Importers, i.e., R. C. Williams & Company, that they will live up to their traditions of a high grade of ethical operations and protect their men in the field, and by so doing also work for the good of their own interests. I do not understand why you do not feel obligated to support me in my claim for commission on Harwood's whisky shipped into my territory. From this side, it looks to me that it would be against R. C. Williams & Company's traditions to have an office [41] in a territory that has been guaranteed that all liquor dealings outside of the metropolitan area, for my territory, go through this office, can allow dealings by which some outsider located in my territory obtain commission or benefits while no consideration is given to your men in this territory. From our early correspondence about Harwood's whisky, I was given the impression that there was no profit in such transactions, in which case it was a matter of courtesy from this side and good teamwork to cooperate. Meanwhile, I am convinced that profits are made on the dealings of Harwood's whisky sent to my territory, and I understand not by Williams Importers, but by

(Testimony of Ove Fog.)

R. C. Williams & Company, and inasmuch as I have been guaranteed that R. C. Williams & Company's wholesale division in New York will not operate directly in this territory, but that transactions concerning sales of liquor would go through this office, it seems logical to me that I am entitled to commission even if Williams Wholesale Division does not want to take advantage of my services, but prefer to handle sales through outside channels, thereby eliminating my rights of livelihood.'

"I would like to emphasize the following paragraphs quoted from your office letter of February 6th, i.e.: [42]

I.

" 'I made it clear, in asking for control of Harwood whisky sales and distribution policies, that we were not interested in one penny of commission any place in the United States.'

"You will understand that from this side it is difficult to understand this is satisfactory to your interest, but of course you know best.

II.

" 'R. C. Williams & Company and any or all of its divisions do not make more than \$1 per case on all of their Harwood that is sold except on that amount of whisky which is wholesaled here in New York City.'

"These facts are contradictory in that I am now advised that our company is making at least \$1 per

(Testimony of Ove Fog.)

case on sales of Harwood whisky, not counting the profit made by the Wholesale Division in New York, while it is previously stated that this business was to be entirely free of profit to our company. If we base Williams' profit on \$1 per case on transactions of Harwood's whisky outside of the metropolitan area, Williams are making a gross profit of \$1750 for each car sold. Inasmuch as there is no financial output as far as Williams is concerned because all sales are covered by letter of credit for the purchasers, Williams' expenses to transact this business [43] settles down to office expenses, and if we would figure that at \$100 per car, which is high, Williams would make a profit of \$1650 per car net.

III.

“ ‘No matter what the outcome is, please forget about your commission arguments on this whisky. It is definitely impossible, and it weakens my position if I state that in addition to control of the item, we want commissions for one of our representatives.’

“Your office seems to ignore the fact that our company is making \$1650 net profit for each car sold, and in the same breath I am asked, as a good fellow, to give up my right to a commission on deals transacted on this item in my territory, which in my opinion is overshooting a little. I have a working agreement with you on a commission basis which would entitle me in this instance to 25c per case

(Testimony of Ove Fog.)

on all Harwood whisky already shipped or coming into this territory, and I am at a loss to see where any sound reason has been advanced for changing this agreement beyond the thought that I would be a good fellow to do so.

IV.

“‘In other words, what I am trying to do is to offer UDL our sales organization at no cost whatsoever, and to have their special agents stay home and [44] collect their commission checks just so long as we can control the entire sales and distribution of this item as long as the R. C. Williams name appears on the bottle.’

“‘You can also realize that I find it difficult to believe that R. C. Williams & Company is any less interested in protecting their men in the field than UDL would be in taking care of their people when a circumstance arises over which those people have no control. Believe me, I am a very reasonable man, but when I make a contract in good faith, the only reason I feel it should be altered is to better serve the other party thereto should that contract become a poor one and he stands to be hurt, which is certainly not the case in the ‘Harwood whisky mystery.’

“‘I suppose even between the best of friends controversies are bound to come up, but so long as I know we both want to be fair such a grievance should not be too difficult to overcome. In this case, R. C. Williams is making some good money on

(Testimony of Ove Fog.)

Harwood whisky. The only trouble appears to be that after that profit is made, the fight is on as to who is going to have what. I am sorry you are the one in the middle, but that is the way it is, and you are the one I must turn to for protection.

“The unhappy phase of the whole matter is that I must write you at this time when you are so crowded with other [45] matters and your impending trip to Europe. I should have much preferred to let the matters rest until your return, but unfortunately your office letter of February 6th has placed me in a position where I have no other choice than to meet the situation right now.

“With best regards,

“OVE FOG.”

I offer this in evidence.

The Clerk: Exhibit 12.

(Whereupon letter dated February 13, 1945, referred to above, was received in evidence and marked Plaintiff's Exhibit 12.)

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 12

Inter-Office Correspondence

R. C. Williams & Co., Inc.

Continental Import Division

610 Fifth Avenue

San Francisco, Calif., February 12, 1945.

Memorandum to: Mr. Jean Ravaud

From: Mr. Ove Fog

Dear Jean:

I have received a letter from your office written by George Ackerman dated February 6, and I have acknowledged receipt of this letter to George informing him I consider it proper to comment on this letter direct to you. My reason for wanting to address my letter direct to you I am sure you will understand, is due to the nature of the matter inasmuch as same concerns my working arrangement with you and also I consider this occasion timely for me to have my position clarified.

I believe you should know by now where you stand with me insofar as my loyalty to the best interests of the organization which I represent. I should be more than glad and consider it a privilege to string along with any necessary arrangement when the going is tough, and take a genuine satisfaction in accepting the good with the bad where it would serve a called for purpose, but I surely feel such thinking should work both ways and I

(Testimony of Ove Fog.)

would now like to know where I stand insofar as the protection my principals are prepared to give their men in the field.

It seems I am again, within a short period of time, placed in the position of differing in views in the matter concerning my remuneration, but I cannot feel you would have more respect for the man who would take this lying down. This naturally becomes a pretty personal matter and one I do not take pleasure in going into, but after all a man's livelihood is a pretty personal matter and he is likely to feel keenly about it.

As an introduction, and to be sure that we understand each other on the subject concerned, I shall refer to the letter I wrote to you on February 2, from which I shall quote as follows:

"The main reason I am sending you the copy of this letter that Alvin Vincent wrote to Mr. Koerner, is because if Mr. Koerner is giving Parrot & Co. an exclusive on Harwood's Whiskey in the Southern territory, it is most harmful to my connections with firms like Bohemian Distributing Co. and Simon Levi & Co., in case they should want to have some of this whiskey, and I greatly resent that working conditions for the good of our mutual interests are wrecked by actions within the ranks of our own company, as I must expect representing a fine firm like Williams Importers, i.e., R. C. Williams & Co., that they will live up to their traditions of a high grade of ethical operations and protect

(Testimony of Ove Fog.)

their men in the field and by doing so also work for the good of their own interests. I do not understand why you do not feel obligated to support me in my claim for commission on Harwood's Whiskey shipped into my territory. From this side, it looks to me that it would be against R. C. Williams & Co.'s traditions to have an office in a territory that has been guaranteed that all liquor dealings outside of the metropolitan area, for my territory, go through this office, can allow dealings by which some outsider located in my territory obtain commission or benefits while no consideration is given to your men in this territory. From our early correspondence about Harwood's Whiskey, I was given the impression that there was no profit in such transactions, in which case it was a matter of courtesy from this side and good team work to cooperate. Meanwhile, I am convinced that profits are made on the dealings of Harwood's Whiskey sent to my territory and I understand not by Williams Importers, but by R. C. Williams & Co., and inasmuch as I have been guaranteed that R. C. Williams & Co.'s Wholesale Division in New York will not operate directly in this territory but that transactions concerning sales of liquor would go through this office, it seems logical to me that I am entitled to commission even if Williams Wholesale Division does not want to take advantage of my services but prefer to handle sales through outside channels, thereby eliminating my rights of livelihood."

I would like to emphasize the following para-

(Testimony of Ove Fog.)

graphs quoted from your office letter of February 6th, i.e.:

1) "I made it clear, in asking for control of Harwood Whiskey sales and distribution policies, that we were not interested in one penny of commission any place in the United States."

You will understand that from this side it is difficult to understand this is satisfactory to your interest, but of course you know best.

2) "R. C. Williams & Co. and any or all of its divisions do not make more than \$1.00 per case on all of their Harwood that is sold except on that amount of whiskey which is wholesaled here in New York City."

These facts are contradictory in that I am now advised that our company is making at least \$1.00 per case on sales of Harwood Whiskey not counting the profit made by the wholesale division in New York, while it is previously stated that this business was to be entirely free of profit to our company. If we base Williams' profit of \$1.00 per case on transactions of Harwood's Whiskey outside of the metropolitan area, Williams are making a gross profit of \$1750 for each car sold. Inasmuch as there is no financial output as far as Williams is concerned because all sales are covered by Letter of Credit from the purchasers, Williams' expenses to transact this business settles down to office expenses and if we would figure that at \$100 per car, which is high, Williams would make a profit of \$1650 per car net.

(Testimony of Ove Fog.)

3) "No matter what the outcome is, please forget about your commission arguments on this whiskey. It is definitely impossible, and it weakens my position if I state that in addition to control of the item, we want commission for one of our representatives."

Your office seems to ignore the fact that our company is making \$1650. net profit for each car sold, and in the same breath I am asked, as a good fellow, to give up my right to a commission on deals transacted on this item in my territory, which in my opinion, is over-shooting a little. I have a working agreement with you on a commission basis which would entitle me in this instance to 25c per case on all Harwood Whiskey already shipped or coming into this territory, and I am at a loss to see where any sound reason has been advanced for changing this agreement beyond the thought that I would be a good fellow to do so.

4) "In other words, what I am trying to do is to offer to U.D.L. our sales organization at no cost whatsoever and to have their special agents stay home and collect their commission checks just so long as we can control the entire sales and distribution of this item as long as the R. C. Williams name appears on the bottle."

You can also realize that I find it difficult to believe that R. C. Williams & Co. is any less interested in protecting their men in the field than U.D.L. would be in taking care of their people when a cir-

(Testimony of Ove Fog.)

cumstance arises over which those people have no control. Believe me, I am a very reasonable man, but when I make a contract in good faith, the only reason I feel it should be altered is to better serve the other party thereto should that contract become a poor one and he stands to be hurt, which is certainly not the case in the "Harwood Whiskey mystery!"

I suppose even between the best of friends controversies are bound to come up, but so long as I know we both want to be fair such a grievance should not be too difficult to overcome. In this case, R. C. Williams is making some good money on Harwood Whiskey. The only trouble appears to be that after that profit is made, the fight is on as to who is going to have what. I am sorry you are the one in the middle, but that is the way it is and you are the one I must turn to for protection.

The unhappy phase of the whole matter is that I must write you at this time when you are so crowded with other matters and your impending trip to Europe. I should have much preferred to let the matter rest until your return, but unfortunately your office letter of February 6 has placed me in a position where I have no other choice than to meet the situation right now.

With best regards,

OVE FOG.

OF:vh

[Endorsed]: Filed Dec. 28, 1948.

(Testimony of Ove Fog.)

The Court: Now, Mr. tum Suden, this dispute continued right up to the time that the agreement of March, 1946, was made?

Mr. tum Suden: Yes, your Honor.

The Court: Correspondence continued to pass between the parties?

Mr. tum Suden: This correspondence; I am bringing it up to that. This letter, here, brought the thing more or less to an issue.

The Court: This letter?

Mr. tum Suden: This letter that I just read. It sets forth his position.

The Court: Now, is there an additional letter, or is there additional correspondence that you are going to put in [46] between now and March of 1946?

Mr. tum Suden: Yes, your Honor, I would like to, a few letters.

The Court: Why don't you get them all together and submit it to the other attorney and just offer it as one?

Mr. tum Suden: If the Court desires me to, I would be glad to.

The Court: I mean, I think it would probably save time if you would hand them, or call their attention to the letters you are going to put in, in the order you are going to put them in, and then they can always be looking at one, and it will save time in putting them in.

Mr. tum Suden: All right.

(Testimony of Ove Fog.)

Mr. Farragher: There is no objection to the introduction of this. We will stipulate it was sent by Mr. Ravaud and received by Mr. Fog.

The Court: Very well.

Mr. tum Suden: This letter, if the Court pleases, is one dated March 5, 1945. It is addressed to Mr. Fog by Mr. Ravaud, and it is an acknowledgment of that letter of February 12 and 13 which I just read. He states that he has waited until today, and is answering the letter of February 12, "because I thought that by this time we would have been able to settle the matter to the satisfaction of everyone concerned, and we had to wait for Mr. Klein to return from [47] Canada."

It reiterates that R. C. Williams is making \$1 a case on Harwood, gross profit, but even if it seems "paradoxical, it is not Williams Importers, and you are working for Williams Importers."

It relates also to attempts to arrange for the possibility of a commission for Mr. Fog, but it does not——

The Court: Have it marked and I will look at it while you get ready to present the next one.

Mr. tum Suden: Yes, your Honor.

The Clerk: Exhibit No. 13.

(Letter referred to above dated March 5, 1945, was received in evidence and marked Plaintiff's Exhibit 13.)

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 13

Inter-Office Correspondence

Williams Importers

A Division of R. C. Williams & Co., Inc.

610 Fifth Avenue

New York, March 5, 1945.

Memorandum to: Mr. Ove Fog

From Mr. Jean Ravaud

Dear Ove:

I waited until today to answer your letter of February 12 regarding what you call the Harwood Whiskey mystery, because I thought that by this time we would have been able to settle the matter to the satisfaction of everyone concerned, and we had to wait for Mr. Klein to return from Canada.

We had a conversation with Mr. Klein, and it looks very much as if we are going to be able to make a satisfactory settlement in the near future.

You can be sure that we appreciate the fairness of your suggestions regarding the distribution of Harwood in Southern California, but the matter is more complicated than you understand and what you are trying to explain.

It is true that R. C. Williams is making \$1.00 a case on Harwood, gross profit, but even if it sounds paradoxical, it is not Williams Importers, and you are working for Williams Importers. As a matter of fact, I am also working for Williams Importers and I have nothing to do with the sales of R. C. Williams.

(Testimony of Ove Fog.)

It is also true that I do not at all like the Harwood setup and it is for this reason that George Ackerman and I are trying to find the ideal solution. In that solution, we will try to obtain a possible compensation for the salesmen of Williams Importers.

As a matter of fact, I want to point out that even if we can arrange that you receive a commission on this transaction, Williams Importers has given up the idea of making any profit on Harwood, but will probably handle it just as an accommodation for the salesmen and distributors.

Things are not moving here as fast as you think and decisions are not reached as easily as you hope they are. Therefore, you have to be patient, and as they say in America, "wait and see."

/s/ JEAN.

(Jean Ravaud.)

[Endorsed]: Filed Dec. 28, 1948.

Mr. Farraher: I wonder if I might suggest to Mr. tum Suden that he have his witness identify the Mr. Klein referred to in the letter.

The Court: Yes.

Q. Who is Mr. Klein?

A. Mr. Klein, I understand, is the head of the UDL in Canada.

The Court: Is that correct?

Mr. Farraher: Yes, your Honor.

(Testimony of Ove Fog.)

Q. (By Mr. tum Suden): Now, Mr. Fog, in response to these letters that you wrote to Mr. Ravaud, did you have any direct discussion with either Mr. Ravaud or Mr. Jaburg, or any of the other officers of the R. C. Williams & Company, in regard to [48] the sale of Harwood whisky in your territory?

A. At what time are you referring to?

A. Well, subsequent to the letter of February 12, 1945, did you have further conversations, either by telephone or personally?

A. Yes, I had many.

Q. You had many conversations; who did you have conversations with?

A. Forward and backward with Mr. Ravaud.

Q. Did they ever explain to you how the sales of Harwood whisky were handled?

A. It was always explained to me that R. C. Williams——

Mr. Farraher: Well, if your Honor please, can we fix with whom this conversation was held?

The Court: Who said this? Who was it that told you what you were about to say?

The Witness: Mr. Ravaud.

The Court: All right, go ahead. You started to explain what he had said to you.

A. (Continuing): Mr. Ravaud told me that he couldn't do anything about the Harwood situation for me, because it was not handled by them or by R. C. Williams; it was invoiced, but that was on behalf of the distillery.

(Testimony of Ove Fog.)

Q. (By Mr. tum Suden): Did you have any conversation with Mr. Ravaud or Mr. Jaburg, of Mr. Ravaud's office, on or about September 13, 1945? [49] A. Yes.

Q. In New York?

A. Yes. I had asked to have the Harwood situation cleared up, but for some months there Mr. Ravaud was in France, and Mr. Jaburg couldn't attend to it until Mr. Ravaud came back, so we had to wait for that. So, finally, in September, 1945, I was called to New York for the purpose of presenting the Harwood situation to Mr. Jaburg and have it cleared up. So I went to New York, and I had a meeting with Mr. Jaburg about 11 o'clock in Mr. Ravaud's office, and I asked Mr. Jaburg why I did not get a commission, that I was entitled to a commission on Harwood whisky, and Mr. Jaburg answered me that because Williams Importers didn't handle it. So I said to Mr. Jaburg, "Mr. Jaburg, do you remember that you have confirmed our gentleman's agreement and guaranteed me that any merchandise shipped either from R. C. Williams or from Williams Importers has to go through my office?" To which Mr. Jaburg answered, "I remember that very well." So I said, "Will you give Mr. Ravaud authority to confirm that in a letter?" And he said, "Yes." But in answer to that question of mine Mr. Jaburg then answered, "Oh, yes, but that is a different deal. We don't sell it."

Q. Referring to Harwood?

(Testimony of Ove Fog.)

A. Referring to Harwood.

Q. Well, did you get such a writing from Mr. Ravaud? [50]

A. Yes, I got it just the last hour before I caught my train a couple of days later.

(Mr tum Suden then presented a document to Mr. Farraher for his examination.)

Mr. Farraher: We will stipulate that this document was sent by Mr. Ravaud and received by Mr. Fog, and that it may be introduced in evidence.

Q. (By Mr. tum Suden): This is the letter that you received at that time (handing to witness). Is that the one that you are testifying to?

A. Yes, sir.

Mr. tum Suden: If the Court please, this letter is dated September 13, 1945. It is addressed to Mr. Ove Fog, the Williams Importers, 310 California Street, San Francisco, California. It reads as follows (reading):

“Dear Mr. Fog:

“This will confirm our conversation held in December, 1943, at which time I gave you my verbal assurance that no merchandise would be shipped into your territory by R. C. Williams & Company, Inc., except through the Continental Import Division, now Williams Importers.

“very truly yours,

WILLIAMS IMPORTERS,
JEAN RAVAUD,

General Manager.” [51]

(Testimony of Ove Fog.)

I offer that document in evidence.

The Clerk: No. 14.

(Whereupon letter referred to above, dated September 13, 1945, was received in evidence and marked Plaintiff's Exhibit 14.)

PLAINTIFF'S EXHIBIT No. 14

[Letterhead] Williams Importers, A Division of
R. C. Williams & Co., Inc.

September 13, 1945.

Mr. Ove Fog
Williams Importers
310 California St.
San Francisco, Cal.

Dear Mr. Fog:

This will confirm our conversation held in December, 1943, at which time I gave you my verbal assurance that no merchandise would be shipped into your territory by R. C. Williams & Co., Inc., except through the Continental Import Division, now Williams Importers.

Very truly yours,

WILLIAMS IMPORTERS,
/s/ JEAN RAVAUD,
General Manager.

jr/b

[Endorsed]: Filed Dec. 28, 1948.

(Testimony of Ove Fog.)

Q. (By Mr. tum Suden): Now, Mr. Fog, subsequent to the receipt of that letter, did you have further negotiations or conversations with Mr. Jaburg or Mr. Ravaud in regard to the Harwood whisky commission question?

A. Yes, in that same meeting, Mr. Jaburg said that he would be willing to arbitrate the question of whether I was entitled to Harwood or not. I answered Mr. Jaburg that I was not very well acquainted with arbitration in this country, but I would like to ask my attorney if I would be protected by such an act. And that was where our conversation ended.

Q. And did arbitration ever take place?

A. No, arbitration did never take place.

Q. There was correspondence in regard to arbitration?

A. Yes, there was correspondence, and as you know, I asked you about the arbitration, and you wrote a letter to me, and that letter was sent to Mr. Ravaud, and Mr. Jaburg, and that letter—in that letter you advised——

The Court: Well, don't——

Mr. tum Suden: That is all right.

The Court: You can summarize that situation if there is [52] any dispute about it. There was a discussion about arbitration, but it wasn't had, is that right?

The Witness: That's right.

Mr. tum Suden: The arbitration was not had.

(Testimony of Ove Fog.)

Mr. Farraher: Yes.

Mr. tum Suden: There was a delay.

Q. (By Mr. tum Suden): And why was there a delay in this question of arbitration?

A. For this purpose, that I wanted to—if we should have an arbitration, we should have it in San Francisco, and Mr. Jaburg didn't want to have the arbitration in San Francisco.

Q. Mr. Ravaud was available at that time?

A. No, I think Mr. Ravaud was away for quite a while, and that is why the arbitration question was put off and off. Mr. Jaburg wanted Mr. Ravaud to be present at the time.

Q. So the arbitration did not take place?

A. No.

Q. Did you receive any word from Mr. Ravaud when he returned to the United States?

A. Yes.

Q. Relative to this question?

A. Yes, I received a letter from him after he came back to the United States, and he told me—

Mr. Farraher: Well, just a moment, if your Honor please; we have no objection to the introduction of the letter, but we do [53] object to the witness telling what is in it.

Mr. tum Suden: Well, I just wanted to have one point made.

The Court: Is this something that is germane to the matter, or can we pass it over with a statement?

(Testimony of Ove Fog.)

Mr. tum Suden: Well, it is simply to the effect that Mr. Ravaud reported his return, it is on February 12, 1946, and it notifies Mr. Fog that he will be in San Francisco between the 25th and the 27th of February.

The Court: All right, there is no dispute about that?

Mr. Farraher: None at all.

The Court: All right.

Mr. Farraher: If I might just take a look at that?

Mr. tum Suden: Certainly (handing to Mr. Farraher).

The Court: Does that bring us up, then, to the discussion concerning the agreement, and that resulted in the agreement of March of 1946?

Mr. tum Suden: It brings us up—this date that I have just mentioned brings us up to the time when that discussion was begun.

The Court: And was that in San Francisco?

Mr. tum Suden: In San Francisco.

The Court: Is that what you are going to question the witness about now?

Mr. tum Suden: Yes, your Honor. [54]

The Court: Very well.

Q. (By Mr. tum Suden): Mr. Fog, did you meet Mr. Ravaud in San Francisco on or about the 25th day of February? A. Yes, sir.

Q. Where did you meet him?

Mr. Farraher: That is '45?

(Testimony of Ove Fog.)

Mr. Tum Suden: '46.

Mr. Farraher: Oh, '46.

Q. (By Mr. Tum Suden): And where did you meet him?

A. At the Palace Hotel in San Francisco.

Q. Was he alone?

A. No, he was accompanied by Mr. Jaburg and Mr. Jacobs and Mr. Koerner.

Q. As I understand it, Mr. Jaburg, Mr. Jacobs and Mr. Koerner.

Now, did you have any discussions with any of these gentlemen at that time relative to the Harwood whisky transaction?

A. Yes, I was again—Mr. Jaburg again told me that I had no valid claim on commission on Harwood.

Q. Mr. Jaburg told you that? A. Yes.

Q. Did you have any discussion with Mr. Ravaud at that time? A. Yes.

Q. Do you recall any particular discussion?

A. Yes, I can recall a discussion. As I previously stated, Mr. [55] Ravaud told me that I had no valid claim on Harwood whisky, and we then talked again about arbitration, and I stated that I thought it would be better for both parties if we had a friendly suit. Mr. Jacobs then answered that in that case, I would have to resign, to which I answered him, "No, I do not want to resign, but I prefer that I am discharged and have that in my records." To which Mr. Jaburg answered that he didn't want that.

(Testimony of Ove Fog.)

Q. Did you have discussions relative to a settlement of your claim with any of these parties at that time?

A. Yes, at this particular talk I was referring to, that ended up by—that I was to decide what I was going to do about arbitration or filing suit, or forgetting it. But it was for me to make up my mind, and I had to leave an answer. So I believe a day or two after, I talked to Mr. Jaburg one morning in his bedroom. I remember that the only attire he had on were his BVD's; I remember that distinctly, and that is how I can recall this conversation. I said to Mr. Jaburg that from his assurance to me, I understand that I have no commission on Harwood whisky, and I might just as well understand that, but I feel that R. C. Williams was making quite a lot of money on the franchise in New York, and, after all, the Harwood whisky did come out to my territory, and it did interfere a lot with the good will of my customers, because I couldn't provide them with it as I would like to, and I thought that it had been a bitter pill to swallow, and I thought I should have something out of it, even if I had no commission coming. So Mr. Jaburg asked me, "Well, what have you in mind?" So I said, "Well, I have a heavy tax payment coming up that I would like to have taken care of," and he asked me how much that was, and I said that that amounted to about \$10,000. So he said, "Well, I will think it over and see what I can do about it and I will let you know."

(Testimony of Ove Fog.)

Q. Did you discuss any question of employment with Mr. Jaburg or Mr. Ravaud, or Jacobs, at that time?

A. In that particular period?

Q. Yes.

A. Yes, Mr. Jaburg; I think it was either that afternoon or it was the next day that Mr. Jaburg told me that he would take care of that, and then I believe Mr. Jacobs was also present, and suggested that the working agreements, the gentleman's agreement that I had, that it should be put into a contract so that we wouldn't have any misunderstandings in the future. And to which I said that that would be a fine thing, but I would also have to be assured that no merchandise was shipped into my territory by R. C. Williams, except through my office. So Mr. Ravaud, I think, said that they were now going back to New York, and that I would get a sketch for the contract as soon as they got to it.

Q. Well, did you receive the \$10,000 payment at that time? [57]

A. No. Then a short while after, I received a letter from New York, and in this letter was the draft of the form for the contract, and I believe also that there was a draft for the payment of \$10,000. Anyway, the draft of the contract was not at all that we had discussed it out here—Mr. Ravaud and I and sometimes Mr. Jaburg and sometimes Mr. Jacobs. They were all off and on. We talked together. So I wrote back to New York, and——

(Testimony of Ove Fog.)

The Court: I think we had better not go into the letter. If you have a letter, let's put that in. What is he referring to? Is he referring to this settlement of March 8, 1948, when he mentions the contract?

Mr. tum Suden: Yes, he was referring to that. I was going to introduce that in evidence and the correspondence in connection with that.

The Court: Well, I think this is a convenient hour for adjournment.

Mr. tum Suden: It would be a good point.

The Court: And we will proceed tomorrow morning at ten o'clock.

(An adjournment was taken until tomorrow, Wednesday, December 29, 1948, at 10:00 o'clock a.m.) [58]

Wednesday, December 29, 1948

10:00 o'Clock A.M.

The Clerk: Fog v. Williams.

Mr. tum Suden: Ready.

Mr. Farraher: Ready.

OVE FOG

resumed the stand.

Direct Examination

(Continued)

Mr. tum Suden: If the Court please, yesterday afternoon we were at the point where they were having discussions in the Palace Hotel relative to

(Testimony of Ove Fog.)

the so-called settlement. If the Court please, may I just go back a minute? Yesterday I offered a letter dated February 12, 1946, in which Mr. Fog was advised by Mr. Ravaud that he would be out here on the 25th of February.

The Court: 1945?

Mr. tum Suden: 1946.

The Court: Oh, yes, that is right.

Mr. tum Suden: I have here the answer of Mr. Fog to that letter stating that he would be available and also urging the necessity for settling the Harwood situation.

The Court: You wish to offer both letters?

Mr. tum Suden: I think it would be in the interest of saving time showing that Mr. Fog was——

The Court: Any objection?

Mr. Farraher: No objection. [59]

The Court: Very well, that may be admitted.

(The letter of February 12, 1946, referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 15.)

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 15

[Letterhead] Williams Importers.

February 12, 1946.

Mr. Ove Fog
Williams Importers
231 Sansome Street
San Francisco, Calif.

Dear Ove:

I arrived a couple of days ago, but as yet, have not been able to find the time to go over the entire situation and to read all the reports—because as you can imagine, I am pressed with a million and one urgent matters, requiring immediate decisions.

Within a few days, I will send you a long letter, telling you many interesting things. In the meantime, I do not want to wait to let you know that as far as the Hawaiian Islands are concerned, we are going to have this territory included in our territory for Mumm Champagne within two or three months.

I suggest that you do not say anything to anybody about this until you are officially notified.

With best regards.

Sincerely,

WILLIAMS IMPORTERS
/s/ JEAN RAVAUD,

b. General Manager.

(Testimony of Ove Fog.)

P.S. I will probably be in San Francisco between the 25th and the 27th of February, but will let you know definitely. In the meantime, can you tell me your schedule.

[Endorsed]: Filed Dec. 29, 1948.

Mr. tum Suden: May I just read a paragraph of this other letter, if the Court please?

The Court: Very well. What is the date of that letter?

Mr. tum Suden: February 16, 1946.

Mr. Farraher: Is that in evidence?

Mr. tum Suden: It is going to be in evidence next.

Mr. Farraher: If you are going to read it, I think I should see it first, if your Honor please.

Mr. tum Suden: That is one of the letters I just showed you. I am just going to read a paragraph.

Mr. Farraher: I beg your pardon. That is all right.

Mr. tum Suden: It comments on Mr. Ravaud's return from Europe, and then the paragraph I am interested in, and I quote:

“For the good of our mutual interests and future business in this territory, it is important that your decision on the pending matters be rendered. It is also a necessity that the Harwood issue be settled without further

(Testimony of Ove Fog.)

delay. You will better understand why this matter can not be prolonged indefinitely after you now have received the copy of my letter to Mr. Hugo Jaburg of yesterday.”

Mr. tum Suden: I offer that, if the Court please.

(The letter of 2/16/46 was thereupon received in evidence [60] and marked Plaintiff's Exhibit No. 16.)

PLAINTIFF'S EXHIBIT No. 16

231 Sansome Street
February 16, 1946

Mr. Jean Ravaud
Williams Importers
610 Fifth Avenue
New York 20, N. Y.

Dear Jean:

Arriving in my office this morning I was happily surprised to learn from your letter that you now safely have returned to our shore again.

From the many pending matters awaiting your arrival for disposition, you will understand how glad I am to learn that you are back. It is indeed most gratifying to learn that your activities in Europe have been successful, and I am naturally looking forward to hearing further from you in this respect. On account of our mutual great re-

(Testimony of Ove Fog.)

gard for our good friend, Dr. Francis Sylva, of Cereal & Fruit Products, Honolulu, I am naturally most happy to learn that we will be able to distribute MUMM'S in the Hawaiian Islands.

For the good of our mutual interests and future business in this territory, it is important that your decision on the pending matters be rendered. It is also a necessity that the Harwood issue be settled without further delay. You will better understand why this matter cannot be prolonged indefinitely after you now have received the copy of my letter to Mr. Hugo Jaburg of yesterday.

As you will readily understand, my activities and my efforts to look out for your interests here on the West Coast have been very greatly curtailed on account of your prolonged absence,—thereby depriving me of your decisions on certain vital distribution policies. It is very difficult for me to answer a lot of questions which my wholesalers bring to me as to what our final policies will be, and therefore I have tried to avoid them as much as possible without materially hurting our interests.

As your arrival in the United States has been expected for the last three or four weeks, I have hesitated to go away from San Francisco. My territory needs a very thorough going over, and I will have to do a lot of traveling, but such traveling will only have real value after my conference with you.

(Testimony of Ove Fog.)

From your letter you expect to visit San Francisco between the 25th and 27th of February. This is about ten days from today and I shall be waiting for you right here. If your schedule should be delayed, I would suggest that I at once go to New York and talk with you there, as your stand relative to the Harwood issue definitely has to be settled without delay; and with this in mind you may prefer that I come to New York, as I presume that you would desire Mr. Jaburg's presence.

Should you decide to leave for the Coast as scheduled, will you please wire me ahead of time that I may be able to make hotel reservations for you; and will you also advise me the length of time you intend to be here.

With best regards, and Au Revoir.

Yours sincerely,

OVE FOG.

OF:M

[Endorsed]: Filed Dec. 29, 1948.

Q. (By Mr. tum Suden): Mr. Fog, returning to the meeting at the Palace Hotel, did you at any time discuss with either Mr. Jaburg or Jacobs or Ravaud the provisions of your agreement made with Mr. Ravaud relative to shipping merchandise into your territory by R. C. Williams?

A. Yes. During the stay out here, I talked with

(Testimony of Ove Fog.)

everyone of them, but it wasn't in what you would call a meeting. It was in the Palace Hotel, and it might have been in one of the bedrooms. It might have been in the drawing rooms. It might have been in the mornings just as we happened to be there. But the main thing——

Mr. Farraher: If your Honor please, may we have the date of this conversation?

The Witness: Yes, the date of that conversation was in February of 1946. It was made clear by me to them——

Mr. Farraher: Just a minute, if your Honor please. We object to the statement "made clear to me." We would like to have the conversation.

The Court: Yes, just state what you said or what the other party said.

The Witness: I told the gentlemen that the protection I had to have was that no merchandise would be shipped from R. C. Williams into my territory except through my office, and they all understood that and agreed with me on that point.

Mr. Farraher: If your Honor please, we ask that that be stricken out as the conclusion of the witness.

The Court: Yes, that may go out.

The Witness: I beg your pardon?

The Court: You can't state your opinion as to what someone else thought or understood. You can only state what you said and what the other man said.

(Testimony of Ove Fog.)

The Witness: But in this situation where——

The Court: The attorney can argue the case. What you are doing is what many witnesses try to do; they want to argue the case.

The Witness: I am sorry.

The Court: You are limited in telling me what you said and what the other man said as best you can remember it.

Mr. tum Suden: May I ask him a question?

The Court: You go right ahead and develop what you want.

Q. (By Mr. tum Suden): Did Mr. Jaburg or Mr. Ravaud or Mr. Jacobs make any statement or answer to your statement that you insisted on protection against shipment by R. C. Williams into your territory?

A. Yes, they gave me the assurance that I would be protected on that.

Mr. Farraher: If your Honor please, that is the same objection. We would like to know what was said.

Mr. tum Suden: I think when he says they gave him their [62] assurance that he would be protected——

The Court: It is a conclusion. There is no doubt about that.

Q. Can you remember in substance what these men said to you?

A. Your Honor, I am endeavoring very hard to try and place just the words.

(Testimony of Ove Fog.)

Q. You do not have to remember the exact language. If you will state the substance as you recall it, of what these gentlemen with whom you were conferring said, you will answer the question. What did they say? They must have said to you, "Now, Mr. Fog," or whatever they called you, "Ove, such and such is the case," or "We will do such and such," or "We will not do such and such." Try and remember what they said.

A. Whenever I brought up the question—I think I can place it this way—whenever I brought up the question with the gentleman, that particular question or the understanding on my gentleman's agreement with the firm has been so important because——

Q. You are just making a statement to me again. No one is taking issue with you or arguing with you. We are trying to get you to tell us as best you can recall the conversation. That is all.

(To Mr. tum Suden): Why don't you develop it? Perhaps you can ask some further questions, Mr. tum Suden.

Q. (By Mr. tum Suden): Mr. Fog, when you brought up the question in regard to your contract and you told either Mr. Jaburg or Mr. Jacobs or Mr. Ravaud that you insisted on protection against [63] R. C. Williams shipping merchandise into your territory, did Mr. Jaburg or Mr. Ravaud or Mr. Jacobs make any comment on that to you?

(Testimony of Ove Fog.)

A. Yes, they assured me that that was understood.

Mr. Farraher: If your Honor please, it might be after an hour's or two conversation he reaches a conclusion that he was assured such and such.

The Court: Yes. Can't you remember what they said to you?

The Witness: Your Honor, I am trying to explain in words——

Q. (By the Court): That is not so difficult if you stop to think a minute. Don't set yourself up now in opposition to the form of procedure in the courts. You just let yourself relax and go with the tide. When you say, "They assured me that such and such was the fact," what you are doing is making a decision as to what they meant by what they said. What we want to know is not what you think they meant by what they said, but what did they say. Did they say to you, "Mr. Fog, I assure you that such and such is the case"? Is that what you are trying to tell us, or what words did they use?

A. Yes, that is exactly what I am trying to tell the Court, because that was the fact, but I can not remember the words.

Q. In substance, what did these two gentlemen say to you? A. I told——

Q. We know what you said. What did they say? In substance, what words did they use? [64]

A. Well, they nodded their heads and said,

(Testimony of Ove Fog.)

“Yes, we assure you that.” It was at that time such a matter of fact with all of us there wasn’t any procedure at that time. That is why I can’t recall the exact words of it. I am sorry.

Q. (By Mr. tum Suden): Mr. Fog, I show you Plaintiff’s Exhibit No. 14, which is a letter dated September 13, 1945, in which you were confirming the verbal assurance at the conversation held in December 1943 that no merchandise would be shipped into your territory by R. C. Williams, Inc., except through the Continental Import Division. Were the contents of this letter or the making of this letter fresh in your mind at the time you had your meeting at the Palace Hotel?

A. Yes.

Q. Was any reference made during the conversations at the Palace Hotel in regard to this letter or to the substance of this letter?

A. Yes, in my conversation in the Palace Hotel I brought up to Mr. Jaburg and told Mr. Ravaud that I had that assurance that no merchandise would be shipped in my territory by R. C. Williams except through my office, and to that they agreed. To that they said, “That is right.” I suppose that is the way you want me to conform to the court.

Q. Mr. Fog, after the meetings at the Palace Hotel where did you next have any communication with R. C. Williams or Mr. Ravaud or Mr. Jaburg in regard to matters discussed at the Palace Hotel?

A. Then I was called to New York.

(Testimony of Ove Fog.)

Q. Prior to that time——

Mr. Farraher: We will stipulate, if your Honor please, the three letters just handed to us, one dated March 8, 1946, from Ravaud to Fog, one dated March 8, 1946, from Fog to Ravaud, and one dated March 16, 1946, from Ravaud to Fog, were sent by the signers and received by those to whom they are addressed, and they may be admitted in evidence.

The Court: All right. You may read them. You do not have to go through that.

Mr. tum Suden: I just want to ask him a question.

The Court: You may read them in evidence as long as they have been stipulated.

Mr. tum Suden: If the Court please, I refer to the letter of March 8, 1946, from Williams Importers, signed Jean Ravaud, to Mr. Ove Fog. This is a letter of transmittal and it reads as follows. It is short——

“Enclosed you will find two agreements in duplicate. Kindly sign all copies and return them to us for our signature.

“As agreed between us, neither agreement is to be effective without the other.

“Your copies together with a check will be returned to you promptly.

“If you have any question, please phone me.” [66]

And attached thereto were copies of the pro-

(Testimony of Ove Fog.)

posed agreement, or whatever it is, in accordance with the payment of the \$10,000. Perhaps I should read that to you.

The Court: Does that conform to the copy that is attached as Exhibit B to the answer?

Mr. tum Suden: Yes, it is.

Mr. Farraher: In substance they do. There is a sentence added to it.

Mr. tum Suden: This is, as I understand it, the first draft that was sent out for Mr. Fog's signature.

Mr. Farraher: May I withdraw that statement? Were you reading the letter or the exhibit attached to it?

Mr. tum Suden: This is the exhibit. March 8, 1946. This is the release.

Mr. Farraher: The release form?

Mr. tum Suden: Yes.

Mr. Farraher: That is exactly as attached to the complaint.

The Court: Then you do not need to read it.

Mr. tum Suden: Also attached thereto is a copy of a proposed contract covering the terms of his employment for the year ending February 28, 1947, and to be effective March 1, 1946.

Q. Mr. Fog, you received these documents in the mail? A. Yes, I did.

Q. Did you execute those upon receipt or did you take any [67] action in connection with them?

A. No, I did not. I wrote a letter to Mr.

(Testimony of Ove Fog.)

Ravaud in answer to the draft for the contract and told him it was not at all along the lines that we had discussed in San Francisco.

Mr. tum Suden: I will offer this in evidence.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 17.)

PLAINTIFF'S EXHIBIT No. 17

[Letterhead]: Williams Importers, A Division
of R. C. Williams & Co., Inc.

March 8, 1946

Mr. Ove Fog
Williams Importers
231 Sansome Street
San Francisco, Cal.

Dear Ove:

Enclosed you will find two agreements in duplicate. Kindly sign all copies and return them to us for our signature.

As agreed between us, neither agreement is to be effective without the other.

Your copies together with a check will be returned to you promptly.

(Testimony of Ove Fog.)

If you have any question, please phone me.

Sincerely,

WILLIAMS IMPORTERS,
/s/ JEAN RAVAUD,
General Manager

jr/b

Encl.

[Letterhead]: Williams Importers, A Division
of R. C. Williams & Co., Inc.

March 8, 1946

Mr. Ove Fog:

This will confirm our oral agreement of this week, to the effect that while we do not recognize any claim for any commissions on Harwood Whiskey sales in your territory, having previously advised you that Williams Importers has nothing to do with this product, we, in order to obviate any disagreement between us, will pay you the sum of \$10,000. in full and final settlement of all claims which you have made and claims you might assert in the future on the sales of Harwood Whiskey in your territory, as long as this product is not directly handled by the Williams Importers Division.

Will you please sign the original and duplicate signifying your acceptance and return same to us?

Upon receipt of the duplicate and original, your

(Testimony of Ove Fog.)

copy signed by us will be forwarded to you together with our check.

WILLIAMS IMPORTERS
JEAN RAVAUD
General Manager

[Letterhead]: Williams Importers, A Division of R. C. Williams & Co., Inc.

March 8, 1946

Mr. Ove Fog
Williams Importers
231 Sansome Street
San Francisco, Cal.

Dear Mr. Fog:

This will confirm our agreement of this week concerning the terms of your employment as Manager of the Western Division of Williams Importers, A Division of R. C. Williams & Co., Inc., effective as of March 1st, 1946 for the year ending February 28th, 1947, and automatically renewable from year to year unless either party notifies the other by registered mail sixty (60) days prior to the termination of any yearly period of his or its intent not to renew said agreement.

You are to receive an annual salary of \$4,200.00, payable in equal semi-monthly installments.

In addition to your salary, you are to receive a commission of 25 cents per case on the following products sold and delivered in your territory:

(Testimony of Ove Fog.)

Grand Marnier Cordon Rouge Liqueur, Metaxa Greek Specialties, Corgo Brandy & Port Wines, Lozeron Swiss Wines, Diez Hermanos Sherries, Havana Club Cuban Rums, Havana Club Puerto Rican Rums, Bardinet Cordials, Bardinet Specialties, G. H. Mumm Champagnes.

Commission statements are to be rendered monthly.

Commissions on returned merchandise will be charged back against your commission account.

On any additional products that may be handled by this Division for sale in your territory, you will receive a commission in an amount to be agreed upon between us.

Your territory consists of the following:

California, Oregon, Washington, Wyoming, Utah, Nevada, New Mexico, Montana, Arizona, Idaho, Alaska, Hawaii (Except Mumm Champagnes).

Williams Importers reserves the right to determine the quantities of any of its products to be allocated for sale in your territory.

Your duties, generally, subject always to the direction and control of our New York office, shall consist of the following:

To supervise and be responsible for the proper operation of our Western Office.

To employ all necessary personnel after first obtaining the approval of the New York office.

To sell and supervise sales and do all the necessary travelling in connection with same.

(Testimony of Ove Fog.)

Appointment of new or any change of present distributors shall be made only by the New York office.

You are to render an itemized expense account monthly, covering all reasonable business expenses.

You are to devote your full and exclusive time and effort to the conduct of our business.

Very truly yours,

WILLIAMS IMPORTERS

JEAN RAVAUD

General Manager.

[Endorsed]: Filed Dec. 29, 1948.

Mr. Farraher: May it be stipulated, so it comes in in the right order, that is identical with Exhibit A attached to the complaint with the single exception that there is added to it some language on the next to the last paragraph of the first page?

The Court: Comparison will show that.

Mr. Farraher: Yes, your Honor. I will call it to your Honor's attention when I am cross-examining. It must be corrective. I am very sorry. It is attached to the defendant's answer.

The Court: It does not seem to be the same? The document seems to be different.

Mr. tum Suden: The writing? I think maybe that will be cleared up because I might say Mr. Fog finally went to New York and they probably pre-

(Testimony of Ove Fog.)

pared another draft of it for signature in New York.

Mr. Farraher: I notice that is true, if your Honor please. There are several changes in the language. [68]

The Court: It is entirely different.

Mr. tum Suden: That was sent out. May I see that? I have one here.

The Court: Be that as it may, there is no use discussing now what differences there are.

Mr. tum Suden: You are looking at the contract there?

The Court: Yes.

Mr. Farraher: If your Honor, please, it will be shown the contract signed was practically identical with it. That, as I notice, is a contract in December instead of March, a subsequent contract. I am sorry. I made a mistake.

The Court: The contract attached to the answer as Exhibit A does not seem to be in the same language.

Mr. Farraher: No, it was several months later.

Mr. tum Suden: It is a year later.

The Court: What is that?

Mr. tum Suden: The one in the answer is probably the one covering the year 1947. You see, there were two.

Mr. Farraher: That is right.

Mr. tum Suden: It is a later contract.

The Court: Was there a contract of March 8 signed?

(Testimony of Ove Fog.)

Mr. Farraher: Yes, your Honor.

The Court: But not in the same form as that included in Plaintiff's Exhibit 17?

Mr. tum Suden: No. I am sorry if there is confusion here. [69]

The Court: I think it has been cleared up.

Mr. tum Suden: This letter has been identified by Mr. Fog. On March 13, 1946, Mr. Fog wrote to Mr. Ravaud as follows:

"231 Sansome Street, March 13, 1946.

"Mr. Jean Ravaud
Williams Importers
610 Fifth Avenue
New York 20, N. Y.

Dear Jean:

"Thanks for your letter of March 8th enclosing two agreements in duplicate.

"Consistent with my present verbal agreement with Williams Importers and our discussions while you were here—resulting in your decision to put that agreement in contract form—the proposed contract received is barely recognizable and, to my mind, entirely inadequate to eliminate the possibility of future misunderstandings with respect to my position, authority and the extent of my financial participation.

"In order to save time in a lengthy exchange of correspondence, I am enclosing a draft of a con-

(Testimony of Ove Fog.)

tract which I believe will cover my agreement with you and substantiate the terms of the contract as it was outlined in discussion with Mr. Jaburg, Mr. Jacobs and yourself while in San Francisco.

“I recall that we were not all present for all discussions, however I am confident that in a three-way review of [70] our meetings you will find that the points included herein are all facts covered in our various meetings.

“As you know, my knowledge of law is negligible and you or Mr. Jacobs will undoubtedly wish to put this in your own form—or may find some additions which will further serve our purpose—but the issues covered in my draft represent the basic terms and conditions as we covered them for contract purposes while you were all in San Francisco.

“The only point which has come to my mind since your departure is the situation which will arise when we begin our own warehousing and certain merchandise will be returned by Parrott & Co. I believe I have covered this fairly in my draft, however this point remains open for discussion.

“I note the release form submitted only covers \$10,000, while it should read \$10,000.00 cash, plus the \$3,200.00, tax free, at this time remaining on your books against me.” Accompanying that letter, Mr. Fog said his suggested draft. Now, this draft is substantially in the wording of the form that was sent to him in the letter of March 8, but

(Testimony of Ove Fog.)

he had included in this draft certain additions which I would like to call the Court's attention to:

“In addition to your salary, you are to receive a commission of 25 cents per case on all products for which Williams Importers are representatives, sold and delivered in your territory. [71]

“No products will be shipped to or sold and delivered in your territory by R. C. Williams & Co., Inc., or by any of its subsidiaries except through said Western Division of Williams Importers, and upon which you are to receive a commission of 25 cents per case.”

And then it provides for the rendering of statements, commissions on returned merchandise, drawing account and other functions of his employment, territory and so on. I particularly wanted to call the Court's attention to that paragraph that no merchandise was to be delivered into the territory by R. C. Williams or through any of its subsidiaries except through his division. I read from my copy. This is the same, if Your Honor please.

(The documents referred to were thereupon received in evidence and marked Plaintiff's Exhibit No. 18.)

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 18

[In Pencil]: (White sent N. Y.)

231 Sansome Street

March 13, 1946.

Mr. Jean Ravaud
Williams Importers
610 Fifth Avenue
New York 20, N. Y.

Dear Jean:

Thanks for your letter of March 8th enclosing two agreements in duplicate.

Consistent with my present verbal agreement with Williams Importers and our discussions while you were here—resulting in your decision to put that agreement in contract form—the proposed contract received is barely recognizable and, to my mind, entirely inadequate to eliminate the possibility of future misunderstandings with respect to my position, authority and the extent of my financial participation.

In order to save time in a lengthy exchange of correspondence, I am enclosing a draft of a contract which I believe will cover my agreement with you and substantiate the terms of the contract as it was outlined in discussion with Mr. Jaburg, Mr. Jacobs and yourself while in San Francisco.

I recall that we were not all present for all dis-

(Testimony of Ove Fog.)

cussions, however I am confident that in a three-way review of our meetings you will find that the points included herein are all facts covered in our various meetings.

As you know, my knowledge of law is negligible and you or Mr. Jacobs will undoubtedly wish to put this in your own form—or may find some additions which will further serve our purpose—but the issues covered in my draft represent the basic terms and conditions as we covered them for contract purposes while you were all in San Francisco.

The only point which has come to my mind since your departure is the situation which will arise when we begin our own warehousing and certain merchandise will be returned by Parrott & Co. I believe I have covered this fairly in my draft, however this point remains open for discussion.

I note the release form submitted only covers \$10,000.00, while it should read \$10,000.00 cash, plus the \$3,200.00, tax free, at this time remaining on your books against me.

With kind regards to you all,

Sincerely,

OF:M

Enc.

(Testimony of Ove Fog.)

Inter-Office Correspondence

R. C. Williams & Co., Inc.

Continental Import Division

610 Fifth Avenue

San Francisco, Calif., March 8, 1946.

Ove Fog's Draft

Williams Importers

This will confirm our agreement of this week concerning the terms of your employment as Manager of the Western Division of Williams Importers, A Division of R. C. Williams & Co., Inc., effective as of March 1, 1946, for the year ending February 28, 1947, and automatically renewable from year to year unless either party notifies the other by registered mail sixty (60) days prior to the termination of any yearly period of his or its intent not to renew said agreement.

You are to receive an annual salary of \$4,200.00, payable in equal semi-monthly instalments.

In addition to your salary you are to receive a commission of 25 cents per case on all products for which Williams Importers are representatives, sold and delivered in your territory.

No products will be shipped to or sold and delivered in your territory by R. C. Williams & Co., Inc., or by any of its subsidiaries except through said Western Division of Williams Importers, and upon which you are to receive a commission of 25 cents per case.

(Testimony of Ove Fog.)

Commission statements are to be rendered monthly and paid on or before the 15th day of the month following the month in which merchandise was sold.

Commissions on returned merchandise, except on defective or faulty merchandise, will be charged back against your commission account. No commissions are to be charged back against merchandise returned by Parrott & Co. as a result of establishing our own warehouse. However, no commissions are to be paid on any particular line until equal quantities of cases within each line so returned have been sold.

You are to receive a drawing account of \$500.00 per month, against commissions, until the merchandise returned by Parrott & Co. is resold.

It is understood that in the event Williams Importers or R. C. Williams Co., Inc., secure the representation of additional lines or products in said territory, the sale of the same shall be subject to this agreement.

Your territory consists of the following:

California, Oregon, Washington, Wyoming, Utah, Nevada, New Mexico, Montana, Arizona, Idaho, Alaska, Hawaii.

Your duties, generally, subject always to the direction and control of our New York office, shall consist of the following:

To supervise and be responsible for the proper operation of our Western Office.

To employ all necessary personnel after first obtaining the approval of the New York office.

(Testimony of Ove Fog.)

To sell and supervise sales and do all the necessary traveling in connection with same.

You are to follow the general policies as established from time to time by our New York office, but the active management of our Western Division shall be conducted in accordance with your sound discretion, and all business and inquiries concerning said Western Division shall be conducted only through your office. In other words, the over-all policy is our business, and the execution thereof is your business.

You are to render an expense account monthly covering all reasonable business expenses.

It is further agreed that 10% of the annual net profits before taxes of the Western Division office is to be divided and paid 5% to Ove Fog, and the remaining 5% is to be used by Ove Fog for bonuses to employees at his discretion.

You are to devote your full and exclusive time and efforts to the conduct of our business.

Very truly yours,

WILLIAMS IMPORTERS.

By JEAN RAVAUD,

General Manager, R. C. Williams & Co., Inc.

[Endorsed]: Filed Dec. 29, 1948.

Mr. tum Suden: In response to that letter of Mr. Fog's to Mr. Ravaud, he received a letter from

(Testimony of Ove Fog.)

Mr. Ravaud under date of March 16, 1946. This letter has been submitted to Mr. Farraher and he consents to its being introduced into evidence, and I might read a portion of that. This is from Mr. Ravaud to Mr. Fog and he states:

“I have received your letter of March 13th and I am sending a copy of it to Mr. Jacobs along with a copy of this letter to you, so that he will be able to study it before I meet with him and Mr. Jaburg on Monday or Tuesday to discuss [72] the matter.”

Then he takes issue with some of the suggestions that Mr. Fog made. If you want, I might read it. I will read it.

“However, I can tell you now that a few of the terms of the contract which you have changed cannot possibly be accepted. For instance, I cannot guarantee you .25 per case on all additional products which we will sell in California, for the very good reason that I do not know what kind of products we might have to sell, and if the margin of profit will enable us to give you .25 per case commission. As a matter of fact, I recall very well that when we discussed this question in San Francisco it was decided that should any additional lines be offered for sale in your territory through you, you would be entitled to a commission, the amount of which would be mutually agreed upon.

(Testimony of Ove Fog.)

“Another paragraph to which I personally object is the one regarding the conduct of the business in the Western Division, for we definitely want to have the right to communicate from this office with customers in your territory, keeping you posted at the same time. But not exclusively and always through your office. In other words—what you want by that paragraph—is that as far as we are concerned, we must consider your territory as ‘Off Limit.’ ”

The rest of the letter discusses the return of certain merchandise from Parrott & Co. and leaves the matter there. May I [73] offer this in evidence?

(The document referred to was thereupon received in evidence and marked Plaintiff’s Exhibit No. 19.)

PLAINTIFF’S EXHIBIT No. 19

[Letterhead] Williams Importers.

March 16, 1946.

Mr. Ove Fog,
Williams Importers
231 Sansome Street
San Francisco, Calif.

Dear Ove:

I have received your letter of March 13th and I am sending a copy of it to Mr. Jacobs along

(Testimony of Ove Fog.)

with a copy of this letter to you, so that he will be able to study it before I meet with him and Mr. Jaburg on Monday or Tuesday to discuss the matter.

However, I can tell you now that a few of the terms of the contract which you have changed cannot possibly be accepted. For instance, I cannot guarantee you .25 per case on all additional products which we will sell in California, for the very good reason that I do not know what kind of products we might have to sell, and if the margin of profit will enable us to give you .25 per case commission. As a matter of fact, I recall very well that when we discussed this question in San Francisco it was decided that should any additional lines be offered for sale in your territory through you, you would be entitled to a commission, the amount of which would be mutually agreed upon.

Another paragraph to which I personally object is the one regarding the conduct of the business in the Western Division, for we definitely want to have the right to communicate from this office with customers in your territory, keeping you posted at the same time. But not exclusively and always through your office. In other words—what you want by that paragraph—is that as far as we are concerned, we must consider your territory as “Off Limit.”

There are also a few other questions which will be taken up at my meeting with Mr. Jacobs and Mr. Jaburg. Incidentally, when we open our office in San Francisco, you mention that we would have

(Testimony of Ove Fog.)

to take merchandise back from Parrott & Co. I would like to have an idea of the quantities and assortment of the merchandise you think we should take back, although I consider that as we intend to keep Duffield and Alpha as distributors, and in view of our past performances with Parrott & Co., this merchandise should be definitely kept by Parrott for distribution to their two respective wholesale houses in Los Angeles and San Francisco.

Try to send me this information by return mail, so that I have the exact picture in front of me when I discuss the matter here. With kind regards,

Sincerely,

/s/ JEAN RAVAUD.

[Endorsed]: Filed Dec. 29, 1948.

Q. (By Mr. tum Suden: Now, Mr. Fog, after you received that letter from Mr. Ravaud acknowledging the receipt of your suggestions as to the form of contract, when did you next meet with these gentlemen in regard to your contract?

A. I met them in New York.

Q. Did you go there in response to a telephone call or how did you happen to go there?

A. I believe it was by telephone that Mr. Ravaud told me to go to New York.

Q. Where did you meet them?

(Testimony of Ove Fog.)

A. I first met Mr. Ravaud in his office.

Q. On Fifth Avenue?

A. On Fifth Avenue.

Q. Was anybody else present?

A. Not at that time.

The Court: When was this, Mr. tum Suden?

Q. (By Mr. tum Suden): When was this?

A. This was in March.

Q. 1946? A. 1946.

Q. Shortly subsequent to the letters that you sent? A. Yes. [74]

Q. Did you have a discussion with Mr. Ravaud at that time?

A. Yes, I had a discussion with Mr. Ravaud about the contract that was going to confirm our arrangement relative to the correspondence that I had with them just about the week before, and one of the things that I called to Mr. Ravaud's attention was this paragraph that no merchandise was to be shipped by R. C. Williams into my territory without going through my office. That was not in the contract he suggested to me. He answered me that "You already have that guarantee. As a matter of fact, you have it in writing."

Q. Referring to the letter of September——

A. Referring to that letter, a few months ahead of that, so I said, "Well, that is right."

Q. Was there any further discussion with Mr. Ravaud? Anything further?

A. Yes, we also discussed that situation that in

(Testimony of Ove Fog.)

case they should handle more items where there would not be the regular markup—for instance, in this case where we handled lemon juice that was non-alcoholic—in such a case the commission I was to receive could be adjusted.

Q. Do you recall any further conversations regarding the provisions of the contract?

A. Yes, there was a provision that the contract would run from one year to another, while before my contract was only running, I presume, for the regular three months. [75]

Q. Did you have any discussions with Mr. Jaburg in regard to that contract?

A. Well, finally there was—Mr. Ravaud arranged that we should meet with Mr. Jaburg in Mr. Jacobs' office for the signing of the papers.

Q. Did you so meet?

A. So we did meet in Mr. Jacobs' office.

Q. Mr. Jacobs' office?

A. Mr. Jacobs' office.

Q. And Mr. Jaburg—were all three present?

A. Mr. Jaburg, Mr. Ravaud, Mr. Jacobs and myself. I again called to their attention that I hoped that this contract would help eliminate any misunderstandings.

Q. (By the Court): What contract are you talking about?

A. That is the contract of 1946.

Q. Are you talking about a contract that you had not yet signed?

(Testimony of Ove Fog.)

A. Yes, I was going to sign it.

Q. You were going to sign it?

A. I was going to sign it.

Q. Was there a contract signed?

Mr. tum Suden: I understand so, your Honor.

The Court: At the same time was this receipt for the \$10,000 signed? A. Yes. [76]

Q. At the same time? A. Yes.

Q. Where is that contract?

Mr. Farraher: I have a copy of it. That is what I submitted to the court with that letter of March 8th. They sent this out.

The Court: But what contract was signed?

Mr. Farraher: I have the original contract. I am handing counsel a document dated March 8, 1946, form of a letter addressed to Mr. Ove Fog, which is signed Williams Importers, by Jean Ravaud, General Manager, and accepted and approved by Ove Fog.

The Court: Is that the same document that is attached to the plaintiff's exhibit 17, the letter of March 8th?

Mr. Farraher: Yes, your Honor.

Mr. tum Suden: I think it is.

The Court: Just for the clarity of the situation, I asked those questions. I did not understand what the witness was talking about.

Mr. tum Suden: I will have to straighten that out.

The Court: We are moving a little bit slowly in

(Testimony of Ove Fog.)

this matter, and while I do not wish to hurry counsel, it seems to me we could get at this a little more quickly.

Q. After you received this letter of March 8th, in which was enclosed the form of a proposed contract for the year beginning [77] March 1, 1946, and ending February 28, 1947, as well as a copy of the proposed receipt for the \$10,000 settlement——

A. Yes.

Q. After you received those letters you had some correspondence; you objected to the forms of this contract, is that right?

A. Yes.

Q. Then you went on to New York and had a further discussion?

A. Yes.

Q. After the discussions were had you then signed the two papers dated March 8, 1946, in the form in which they were enclosed in the letter to you, is that right?

A. That is right.

Q. At that time did they give you a check for \$10,000?

A. Yes.

The Court: Now I get that clear.

Q. The agreement that you signed, then, is the agreement of March 8th that is attached to the letter of March 8th?

A. That is right, your Honor.

The Court: Plaintiff's Exhibit No. 17, is that right?

Mr. Farraher: Has that been offered, if your Honor please? I think not.

The Court: I do not think it is necessary because the witness said the document signed is in

(Testimony of Ove Fog.)

the same form as the copy that is attached to the letter of March 8th. Put it in if you wish. [78]

Mr. tum Suden: I do not think it is necessary. It is the same one.

Mr. Farraher: If your Honor please, the document attached to the pleadings is not this document.

The Court: I understand that. That is a subsequent agreement.

Mr. tum Suden: That is a subsequent one.

The Court: Go ahead, Counsel. I just did that to clarify the matter.

Mr. tum Suden: Thank you. I want the court to understand the situation.

Q. Mr. Fog, you returned to San Francisco.

A. Yes, but I should like to add, so the court understands, that at the time we signed that contract I mentioned to Mr. Jaburg that because you assure me no merchandise would be sent into my territory except through my office, it is not in the contract, because I understand I am already assured, to which Mr. Jaburg said, "Yes."

Q. Did you return to San Francisco then?

A. Yes.

Q. And continued as Western Division Manager for Continental Imports or Williams Importers?

A. Yes, sir.

Q. And that continued through the year?

A. Yes, sir. [79]

Q. And subsequently a further contract was entered into? A. Yes, sir, in 1947.

(Testimony of Ove Fog.)

Q. 1947? A. Yes.

Q. And that is the contract that is attached to the complaint?

Mr. Farraher: That is right.

Q. (By Mr. tum Suden): Mr. Fog, did you continue during the year 1947 in the employ of R. C. Williams, or Williams Importers?

A. No, I was asked to resign at the end of February, a few months after I had made a new contract for the year.

Q. Was any reason given to you for your resignation?

A. Well, the reason that was given to me was that they were trying to cut down the operations.

The Court: What was the date of that, Counsel? I do not think you fixed any time.

Mr. tum Suden: I can fix that exactly.

The Witness: That commenced the 1st of January.

Mr. Farraher: April 25, 1947, pursuant to their correspondence or phone negotiations, he executed or wrote a letter to Williams Importers, Division of R. C. Williams, submitting his resignation as of April 30, 1947. I think that will be agreed to, will it not?

The Court: In other words, he only functioned under this agreement of December 31, 1946, which is attached as Exhibit A to the defendant's answer, until April of 1947? [80]

Mr. tum Suden: Correct, just a few months.

(Testimony of Ove Fog.)

Q. Mr. Fog, after you severed your connections with Williams Importers or R. C. Williams, when did you learn that R. C. Williams were selling or shipping Harwood whisky into your territory during the years that you were employed by them? Under what circumstances?

A. In January, 1948, I was subpoenaed by the Internal Revenue, Mr. Gaines, relative to some information he wanted regarding the Harwood, what I know about the Harwood transactions during the period that I was manager for Williams out here.

Mr. Farraher: We have no objection to that.

Mr. tum Suden: If the Court desires, I have here a subpoena which was served on Mr. Fog. I will ask him when he received that subpoena.

The Witness: I received that subpoena in accordance with the date on it.

Mr. tum Suden: You received it on January 28, 1948?

A. That is right.

Q. Did you obey that subpoena?

A. Yes, I went to the office of the Internal Revenue and saw Mr. Gaines.

Q. This subpoena called for the production of correspondence, did it not?

A. Yes, he wanted to see whatever letters, if I had any, regarding Harwood, and they took photostats of some of the [81] letters, and Mr. Gaines, who was the Internal Revenue——

Mr. Farraher: If your Honor please, we object to that as hearsay. We have no objection if it is

(Testimony of Ove Fog.)

offered solely for the purpose of showing information that he had, but we want it understood that it is not evidence of anything Mr. Gaines said was necessarily true, because otherwise it would be hearsay.

Mr. tum Suden: Correct. We are not trying to bind the defendant in this action by the statements of Mr. Gaines. I merely refer to this as showing the source of information obtained by Mr. Fog that R. C. Williams shipped Harwood whisky or sold it in his territory, how he discovered that fact.

The Witness: Mr. Gaines asked me what I knew.

The Court: I do not think it is necessary to go into all that? Is there? Is there any necessity of going into the hearing?

Mr. tum Suden: No, may I ask him to simplify **it this** question: In your conversations with Mr. Gaines, who was the investigator for the Internal Revenue, did you at that time learn from him that R. C. Williams sold and shipped Harwood whisky into your territory during the years 1944, 1945 and 1946?

Mr. Farraher: We object to that as calling for the conclusion of the witness: "Did he learn?" We have no objection to your finding out what was told him on that occasion?

Mr. tum Suden: All right. [82]

Q. Were you told by Mr. Gaines?

A. Yes, I was told that Williams were buying Harwood at one price, marking it up and selling it

(Testimony of Ove Fog.)

at another. In other words, they were doing a regular commercial transaction.

Q. That was the first——

A. That was the first time that I learned and knew that R. C. Williams actually sold the merchandise in this country or in my territory. Always before I was informed by R. C. Williams and everybody, all the executives, that they were clearing the merchandise on behalf of the distillery, and therefore that news was very exciting to me.

Mr. tum Suden: I think that is all from this witness.

Cross-Examination

By Mr. Farragher:

Q. Was anything told you at that time, Mr. Fog, as to what the mark-up was?

A. Yes, during the conversation I received two figures, and I remember that the ceiling price of Harwood was always \$20.77. I remember the other price, \$19.05, I think it was, those two prices.

Q. What was the mark-up?

A. \$1.72, I think it was.

Q. You knew clear back in 1944, did you not, that the liquor was clearing through Mr. Koerner, of Williams & Company?

Mr. tum Suden: I think that question should be more specific, if the Court please. What do you mean by clearing? [83]

The Court: If the witness understands it he may answer.

(Testimony of Ove Fog.)

The Witness: What do you mean by "clearing"? May I ask that?

Q. (By Mr. Farragher): No, you can't ask me questions. But you do not understand the question? A. No.

Q. I will clarify it. You knew as early as 1944 that if any customer of yours wanted any Harwood whisky, it had to come through Mr. Koerner, of Williams & Company, didn't you?

A. It had to go through R. C. Williams & Company.

Q. That is not my question. You knew it had to come through Mr. Koerner, of Williams & Company?

A. At what time are you referring to?

Q. As early as 1944?

A. I don't believe that I knew that in 1944.

Mr. Farragher: I did not expect Mr. tum Suden to stop so quickly or I would have been more prepared.

Mr. tum Suden: I think, Mr. Farragher, Exhibit 8 will clear that up.

Q. (By Mr. Farragher): When did you first discover that if any of your customers wanted any Harwood whisky that they would have to do it through Mr. Koerner?

A. I might have discovered that in 1944 and I might have discovered it early in 1945. You have in your different letters and files there a reference from Mr. Ackerman, where he gives [84] me in-

(Testimony of Ove Fog.)

formation that now he knows that Koerner is the man who is to take care of orders.

Q. You made efforts in 1944 and 1945 to have Mr. Koerner arrange for shipments to customers of yours in this territory?

A. Yes, through Mr. Ravaud.

Q. And you made efforts to contact him directly, didn't you? A. Yes, if I could.

Q. You stated from time to time to Mr. Ravaud that you were having difficulty getting answers to your calls to Mr. Koerner?

A. That is right.

Q. You knew during all that time that any of the whisky that came into this community cleared through Mr. Koerner?

A. Yes, it was cleared through R. C. Williams & Company, yes.

Q. And Mr. Koerner was the man, wasn't he?

A. Well, that I must leave to the president of the company to decide.

Q. Mr. Ackerman told you so, didn't he?

A. Told me what? Pardon me.

Q. That Mr. Koerner was the man to see in connection with the purchase of Harwood whisky?

A. That is right.

Q. So you knew that fact without any question at least a year before the so-called settlement, as Mr. tum Suden refers to it? A. Yes. [85]

Q. And you knew for more than a year from information you received from the company, it-

(Testimony of Ove Fog.)

self, that it was making a dollar a case on Harwood whisky that was shipped into your territory?

A. Will you repeat that?

(Question read.)

A. That is not correct. The first information that I received from Mr. Ravaud, from R. C. Williams, regarding the Harwood transaction, was that they were not making anything at all, that they had received the franchise for metropolitan New York to wholesale Harwood whisky, but in return for doing that, they had to clear the merchandise for the distillery on a national scale.

Q. When you say you were first notified Williams & Company was making no money for Harwood whisky, are you referring to what has been marked Plaintiff's Exhibit 6, which is a letter of October 21, 1944, from Mr. Ravaud to yourself (handing a document to the witness)? I call your attention to the last page for the purpose of saving time.

A. The last page where? On the whole letter?

Q. On that exhibit there.

A. What was your question?

(Question read.)

A. Yes, that letter, and from telephone conversations with Mr. Ravaud.

Q. What language in that letter do you say gave you that information? [86] Just read the language from that letter that told you that Williams & Company was making no money off the Harwood?

(Testimony of Ove Fog.)

A. So that it can be clear, I will have to read quite a little of this letter:

“R. C. Williams Wholesale Department have the exclusive franchise of this whisky for New York, provided that they accommodate the Canadian Distillers by clearing the merchandise for them and doing the billing in the United States.”

Mr. Farragher: Can I interrupt you, Mr. Fog?

Mr. tum Suden: Let him read.

Mr. Farragher: That is not an answer to the question, at all. That language does not relate to the question whether or not they were getting any money.

The Witness: It does as far as I am concerned, your Honor, if I may.

The Court: Let me see the letter.

Mr. Farragher, I think the letter speaks for itself. The question is really argumentative. So far as the time element is concerned, I suppose the question would be proper, if that is the first time he learned; but if you ask him to pick out the part of the letter, it becomes argumentative, because I can read the letter, and I would rather determine that, myself, than have the witness tell me what the letter means.

Mr. Farragher: That is true, your Honor, except this witness [87] is relying upon a setting aside of a settlement agreed upon the ground of misrepresentation on this very point.

(Testimony of Ove Fog.)

The Court: I am not ruling against you. I think you misunderstand me. I am saying you can point out the letter, yourself, and I can read it without asking the witness the question.

Mr. Farraher: May I read to your Honor the portion that is referred to and ask the witness if that is what he means?

The Court: Why don't you read the paragraph on the second page to which you refer and ask the witness if that is the first time that he had heard that they were not making any money, or whatever it was that you want to bring out? I only say that because if you give the witness the letter, he is going to read it and make an argument. That is the natural response to that type of question.

Mr. Farraher: That is right, your Honor. I appreciate that.

Q. I call your attention to the language in Plaintiff's Exhibit 6, which is a letter, you will recall, from Mr. Ravaud to yourself:

“As you know, we are not making any money at all on the Canadian whisky.”

Q. Is that the language that you referred to a minute ago when you said you were told that Williams & Company were making no money out of the whisky? [88]

A. I am referring to the letter as a whole.

Q. On what form were you advised that Williams & Company were making no money out of Harwood whisky?

A. Because they are——

Q. No, in what form.

(Testimony of Ove Fog.)

A. In the form that they are just accommodating.

The Court: No, he means were you told orally or were you told in writing—is that what you mean?

Mr. Farraher: Yes.

The Witness: At that particular time?

Q. (By Mr. Farraher): Mr. Fog, you testified a moment ago that you were first advised that Williams & Company made no money out of Harwood whisky. I am trying to find out from you specifically and definitely in what form, whether it was written or oral, that you got any such information.

A. I should refer to that letter, there.

Q. Is this the letter that you refer to?

A. I will be glad to refer to that letter.

Q. That is the letter. Now, when you read the language written by Mr. Ravaud to you, "As you know, we are not making any money at all on the Canadian whisky," whom did you consider he meant by "we"?

A. R. C. Williams & Company.

Q. What was Mr. Ravaud's job?

A. Mr. Ravaud? [89]

Q. Yes.

Mr. tum Suden: I think this is argumentative, if the Court please.

Mr. Farraher: I do not think so, if your Honor please. There are allegations of false representations here.

The Court: I will overrule the objection.

(Question read.)

(Testimony of Ove Fog.)

A. He was general manager for Williams Importers.

Q. (By Mr. Farragher): Williams Importers was a Division of Williams Company, was it not?

A. It was a division, yes.

Q. And you were working for Williams Importers?

A. I was working for R. C. Williams Division of Williams Importers, and so was Mr. Ravaud, as I understand.

Q. You were working for the division called Williams Bros., is that right? A. Yes.

Q. And you got all your instructions with reference to the handling of the business in your territory from Mr. Ravaud as the manager of that division? A. That is right.

Q. And you had no business of any kind with Williams & Company, itself, the company office, until this Harwood situation arose, is that true?

A. That is right. [90]

Q. So that at the time this letter was written you had no business with Williams & Company, except through the division; that is true, isn't it?

A. I believe so.

Q. At least a year before the so-called settlement or the settlement you knew that Williams & Company was making a dollar a case on the goods, didn't you?

A. Is it a year? I do not have the date of that letter. Maybe you can show it to me.

(Testimony of Ove Fog.)

Q. The letter is February 6, 1945.

A. There is only one letter.

Q. Plaintiff's Exhibit 11.

A. Pardon me. What was the question?

(Question read.)

A. Yes, sir. By letter that I received from Mr. Ackerman on February 6th, he tells me for the first time that now Williams is making a dollar a case on it.

Q. Did you ever inquire of Williams & Company when you learned that there was a mark-up, how much the mark-up was?

Mr. tum Suden: You had better fix the time.

Mr. Farraher: Withdraw that.

Q. After you talked to Mr. Gaines, did you ever discuss the question of the Harwood commissions with any officers of Williams & Company prior to your filing suit? A. No. [91]

Q. You do not know, do you, right now, whether or not Williams was making more than \$1 a case upon the goods, Harwood goods shipped into your territory?

A. I know now that there was a mark-up of \$1.72.

Q. That is not answering my question. You do not know now whether they were making more than \$1 a case on Harwood shipped into your territory?

Mr. tum Suden: I do not think he can answer that question.

Mr. Farraher: He certainly can answer whether he knows.

(Testimony of Ove Fog.)

The Witness: I just don't know an answer to the question.

Mr. tum Suden: Whether he knows at the present time what they are making on Harwood? Is that it?

Q. (By Mr. Farraher): You knew in February, 1945, that Williams & Company was making a dollar a case on Harwood? A. Yes.

Q. Have you any information in your possession that during the time you were with that company that Williams & Company ever made 5 cents more than one dollar a case on the Harwood shipped into your territory?

A. The only information that I have——

Q. No, no, you can answer that "Yes" or "No." if your Honor please. I am asking him if he knows.

The Witness: Can't we simplify the question?

Mr. Farraher: I will try it again.

The Court: I do not think there is any particular difficulty [92] about that question.

(Question read.)

A. No, I have not.

Q. (By Mr. Farraher): Just what information did you receive from Mr. Gaines in addition to the information that you had at the time you resigned in April, 1947, with reference to what Williams & Company made on Harwood shipped into your territory?

A. I got the information that Williams bought the merchandise at a certain price, marked it up,

(Testimony of Ove Fog.)

sold it at another price, and there was a mark-up of \$1.72.

Q. And you do not know whether that \$1.72 represented profit, or not?

A. I was not interested in what they made on it, at all. The thing that interested me was the fact that R. C. Williams owned the merchandise and performed a regular sale?

Q. What do you mean by a regular sale?

A. Well, in the school I came from, when a merchant buys merchandise at one price, marks it up and sells it at another, that I consider a sale.

Q. You do not consider that a commission?

A. Absolutely not.

Q. And your reason, then, for asking that this settlement contract be set aside is that although you knew, you thought you were making a commission on the sales, you found out instead [93] of it being a commission it was a mark-up——

A. What I found out——

Q. No, no, you can answer that "Yes" or "No."

A. You will have to repeat it.

(Question read.)

A. I found out that R. C. Williams' representation that they were just clearing the merchandise was absolutely contrary to the fact that inasmuch as they did not import the merchandise on behalf of the distillery, they imported it for themselves, owned the merchandise after it arrived in this country, bought it at one price and billed it at another

(Testimony of Ove Fog.)

and made a profit on it, that was contrary to my understanding of clearing it.

Q. What difference would it make to you in your position whether they did it one way or the other?

A. The difference to me is whether I was to receive a commission or not, because if they sold the merchandise and shipped it into my territory, I was guaranteed a commission on such sales, but if they were only acting on behalf of the distillery and just making a commission, themselves, then it might be possible that I am not entitled to it.

Q. You know, do you not, that all the Harwood that was shipped into your territory was shipped from the distillery? You know that, do you not?

A. Yes.

Q. And you know that the goods were purchased, that the invoices [94] for any goods that were shipped into this country made into your territory were shipped by Williams & Company?

A. Yes, sir.

Q. You knew that? A. Yes, sir.

Q. You knew that any goods that were purchased, any Harwood that was purchased in this territory had to clear through him?

A. Yes, at a certain time of the transactions I got a letter from Mr. Ackerman, where he tells me that now he knows it has to go to Koerner. I don't remember the date.

The Court: That was a letter of either October or December, 1944.

(Testimony of Ove Fog.)

Mr. tum Suden: Exhibit No. 8.

The Court: While you are getting that perhaps we might take the recess at this time.

(Recess.)

Q. (By Mr. Farragher): Mr. Fog, I understood you to say before the recess that you were subpoenaed down to the Internal Revenue Department?

A. That is right.

Q. To bring with you what papers you had concerning the Harwood? A. Yes.

Q. What papers did you have?

A. Mr. tum Suden has whatever papers there are. [95]

Q. Included in those papers were the documents that were introduced in evidence here yesterday and today? A. Yes.

Q. Those were the documents that you had with you when you went to the Internal Revenue Department? A. Yes.

Q. That was almost a year after your resignation from the company? A. That is right.

Q. Those were part of the files of the company, were they not? A. Yes.

Q. Did you have any permission to take them with you?

A. Those files that was in my possession were files that concerned my special communication with the company regarding the dispute we had about Harwood, and the reason that I had them with me was because when I went to New York in 1945

(Testimony of Ove Fog.)

to have the meeting with Mr. Jaburg, at that time I asked my secretary to take out from the files anything that had to do with Harwood, regarding my person, and those were the papers I took with me there, and when I came back, that folder went into my drawer in my desk, together with other folders that I had there. I suppose you are trying to find out how I happened to have them. Is that the purpose?

Q. Yes.

A. So when I left Williams Importers I cleared my desk. Whatever [96] was in that drawer was put down in a box with a lot of other things, and that was taken to a place.

Q. How did Mr. Gaines know that you had any files of the company with you?

Mr. tum Suden: I think that is calling for the conclusion of the witness.

Q. (By Mr. Farraher): If you know.

A. Well, I know, because he asked me if I had any when he talked to me on the phone.

Q. Did you call him or did he call you?

A. He called me.

Q. Did you at the time you left the employ have in mind that you might want to sue the company for any money?

A. Never for one minute.

Q. Did you consider that the documents that you signed with them was a complete settlement of your dispute with them with reference to your right to commissions on Harwood?

(Testimony of Ove Fog.)

A. At the time——

Q. No, no, answer that “Yes” or “No,” please.

(Question read.)

A. I had no dispute with them any more about Harwood. That was settled.

Q. How was it settled?

A. It was settled, I was told——

Q. Wait a minute. How was it settled? [97]

Mr. tum Suden: Let him answer.

The Witness: I think I can answer.

The Court: Just a moment. Take it easy. I think what the attorney wants to know is when you did make the settlement with them and sign the agreements, you considered that a settlement of your grievance with the company?

Q. (By Mr. Farraher): That that settled the dispute with the company with regard to your commission? A. No.

Q. When did you sign the release?

The Court: I do not think he understands the question.

The Witness: No.

The Court: You had better ask your own questions.

The Witness: I would like to answer that question.

The Court: You just relax now and wait until they ask you a question.

Q. (By Mr. Farraher): Calling your attention to what has been marked Plaintiff's Exhibit 17,

(Testimony of Ove Fog.)

which is the letter which Mr. Ravaud sent to you under date of March 8, 1946, enclosing a form of release, which I am showing to you, being the first exhibit attached to the letter—— A. Yes.

Q. You finally, as you have testified, executed that sometime later? A. Yes. [98]

Q. That very document? A. Yes, sir.

Q. When you executed that document did you consider that by doing so you had settled your dispute with Williams & Company with reference to your right to commissions on Harwood?

A. At the time I settled this and signed this there was no dispute. There was nothing to settle.

Q. The day before you signed it you had a long running dispute with them, didn't you, with reference to your commissions on Harwood sales?

A. Not a long running dispute. The reason that I received this \$10,000 was due to the fact that Mr. Jaburg had told me that I did have no commission coming on Harwood, and I finally settled down and believed it, that he was fair and sincere when he made that statement to me, and then I received \$10,000, as I have already testified earlier, as a good will settlement.

Q. You considered the \$10,000 a gift and it had nothing to do with the dispute with reference to Harwood?

A. I shall not say it was just a gift. My business and my territory had been injured by the fact that Harwood was shipped into my territory. I

(Testimony of Ove Fog.)

could not make it available for my customers and R. C. Williams could do nothing about it.

Q. Mr. Fog, you had repeatedly, from 1944 on, been demanding commissions on Harwood that came into your territory, hadn't you, and it got to a point in the fall of 1945, September or [99] October, 1945, that you had this talk with Mr. Jaburg and you determined that you would submit the matter to arbitration? A. That is right.

Q. What was the matter you were going to submit to arbitration?

A. Whether I was entitled to a commission on Harwood whisky or not.

Q. Before you agreed to the submission to arbitration you consulted your attorney?

A. No.

Q. You had not? A. No.

Q. Didn't you testify that when you first had the talk with reference to arbitration that you had to return to California and discuss it with the attorney because you were not familiar with it?

A. After the arbitration question was—the first time the arbitration question was brought up, that is the time I said I would have to talk to my attorney and ask him what it meant.

Q. And you did? A. I did, yes.

Q. And you told your attorney all the facts in your possession with reference to your matter?

A. Not at all.

Q. You did not tell him anything?

(Testimony of Ove Fog.)

A. Nothing at all, only the question of arbitration. I have had [100] no legal advice whatsoever on the Harwood matter. I felt I was dealing with friends that would treat me the way I treated them.

Mr. Farraher: I am handing counsel two letters, one of February 13, 1945, I think signed by Mr. tum Suden, to Ove Fog, and one dated February 15, 1946, from Fog to Mr. Jaburg.

Mr. tum Suden: It looks like somebody has been in my office.

Mr. Farraher: No, this is one that got into our files.

Will you stipulate that you signed it? I have to ask the witness about it, anyway, so I might just as well have him identify it.

Mr. tum Suden: I signed that.

Q. (By Mr. Farraher): Mr. Fog, I am handing you a letter signed by Mr. tum Suden, addressed to you under date of February 13, 1946, and I will ask you whether or not you recall——

Mr. tum Suden: First I would like to have a foundation for that letter, Mr. Farraher, where it came from, and how it got into your possession.

Mr. Farraher: Naturally, it was in the files of the company or we would not have it. It would indicate the witness was more careful taking out some of the files of the company than he was of his own.

Mr. tum Suden: It could have been overlooked. I do not think it is important, anyway. [101]

Q. (By Mr. Farraher): You recall the occa-

(Testimony of Ove Fog.)

sion of receiving that, do you not?

A. Yes, I believe so.

Mr. Farragher: May I offer this, if your Honor please, in evidence, this letter of February 13, 1946, just identified by the witness, and then I want to ask the witness another question about it.

Mr. tum Suden: I question that I would send Mr. Fog a letter in that form.

Mr. Farragher: I am going to ask him about the alterations on that.

Mr. tum Suden: It must have come from my office somehow or other.

Mr. Farragher: I am going to ask him about the alterations.

Mr. tum Suden: Those alterations are in my handwriting. That is a draft of a letter I prepared for him. Whether or not it was sent, I do not know.

Mr. Farragher: When I was examining him I assumed it was Mr. Fog's handwriting, not yours.

Mr. tum Suden: No, it is a draft, corrections made by me in a letter which was probably sent out finally in that form.

Mr. Farragher: May I read the letter?

The Court: Let me see the letter.

(The document referred to was handed to the Court.)

Q. (By Mr. Farragher): I call your attention to the alterations [102] on the next to the last paragraph, the sentence reading, "Assuming that you are a citizen of California, and the R. C. Williams

(Testimony of Ove Fog.)

Company is not a California corporation, the action may be brought in the Federal District Court at San Francisco on the ground of diversity of citizenship." Then there was first written in ink and then scratched out, "Obviating the necessity of your going to New York." Is that your handwriting? A. No.

Q. Mr. tum Suden's?

A. I wouldn't know.

Q. Is there any of your handwriting on that?

A. I do not think so.

Q. Was that a letter that you and Mr. tum Suden got together to write so as to send a copy to Mr. Ravaud?

A. May I read the letter again? I don't recall exactly. This letter must be with reference—again with reference to the arbitration situation, because I hadn't consulted, that I recollect, the Harwood situation——

The Court: Look at the letter before you answer the question. Read the first paragraph. According to that letter you did consult with Mr. tum Suden about your commissions, whether or not you should arbitrate the dispute or go to court.

Q. Is that the truth, or not?

A. Yes. [103]

Q. You were mistaken a while ago when you said you did not consult with them?

A. Yes, I did not know I had brought this up to them to this extent, but I must have.

(Testimony of Ove Fog.)

Q. (By Mr. Farraher): With your memory refreshed from that, you did convey to Mr. tum Suden all the information you had with reference to your claim, did you not?

A. No, not all the information, because—why I can say that is because this must have been a very small matter, because I didn't get, as far as I know, a bill for the consultation. I only received one bill from Mr. tum Suden with regard to this one, and that was for his advice regarding the arbitration. So this must be a small matter.

Mr. Farraher: I am surprised that Mr. tum Suden would establish a precedent of that kind.

Mr. tum Suden: If you want me to testify I will tell you what happened.

Mr. Farraher: I will offer the letter of February 15, 1946, from Mr. Farraher to Mr. Jaburg.

(The two letters referred to were thereupon received in evidence and respectively marked Defendants' Exhibits A and B.)

(Testimony of Ove Fog.)

DEFENDANT'S EXHIBIT A

Cable Address "Tumsuden"

Peter tum Suden
Richard tum Suden
Attorneys at Law
605 Market Street
San Francisco 5
Phone DOuglas 0193

February 13, 1946.

Mr. Ove Fog
231 Sansome Street
San Francisco, California

Dear Mr. Fog:

I have reviewed the questions submitted to me relative to your claim for commissions as representative of R. C. Williams Co., Inc. (i.e. Williams Importers). It is my considered opinion that if the matter must be settled by litigation your interests will be better served by court procedure rather than by arbitration. A trial by court permits a more through presentation of the facts. Furthermore, the findings of the court may be reviewed by appeal which ordinarily cannot be done in arbitration proceedings.

[Williams Importers, i.e. R. C. Williams & Co., Inc., in pencil.]

The amount and issues involved are too important

(Testimony of Ove Fog.)

and warrant the most serious and thorough consideration.

Assuming that as you are a citizen of California and the R. C. Williams Co., is not a California corporation, the action may be brought in the Federal District Court at San Francisco on the ground of diversity of citizenship obviating the necessity of your going to New York.

May I also call to your attention that because of the statute of limitations and possible claim of laches, you should take prompt action. Otherwise you may be foreclosed.

Yours very truly,

/s/ RICHARD TUM SUDEN.

Rts:R

I shall be pleased to hear from you at your earliest convenience your reaction to the suggestions of my advisor inasmuch as I know that you are also interested in protecting my rights.

[Endorsed]: Filed Dec. 29, 1948.

(Testimony of Ove Fog.)

DEFENDANTS' EXHIBIT B

[Letterhead] Williams Importers.
231 Sansome Street

February 15, 1946.

Mr. Hugo F. Jaburg, President
R. C. Williams & Co., Inc.
265 Fifth Avenue
New York, N. Y.

Dear Hugo:

In anticipation of Mr. Ravaud's return and an early handling of the Harwood matter I have, in the interest of fairness to the respective positions we have taken, again carefully reviewed the facts. In an effort to remove any remaining doubts in my mind, I presented the matter to my legal advisers, requesting an impartial opinion of my views. I quote below the letter just received from them:

"I have reviewed the question submitted to me relative to your claim for commissions as representative of Williams Importers, i.e., R. C. Williams & Co., Inc.

It is my considered opinion that if the matter must be settled by litigation, your interests will be better served by court procedure rather than by arbitration. A trial by court permits a more thorough presentation of the facts. Furthermore, the findings of the court may be reviewed by appeal,

(Testimony of Ove Fog.)

which ordinarily cannot be done in arbitration proceedings.

The amount and issues involved are of such importance that they warrant the most serious and thorough consideration.

As you are a citizen of California, and the R. C. Williams Co. is not a California corporation, the action may be brought in the Federal District Court at San Francisco on the ground of diversity of citizenship.

May I also call to your attention that because of the statute of limitations and possible claim of laches, you should take prompt action; otherwise you may be foreclosed."

As I now have reviewed this matter fully again, will you allow me to suggest that you—from your side—also review the matter with your legal counsel. After you have done this and made yourself again familiar in detail with your Company's commitments to me, I believe that you will respect the stand I take.

Knowing that you wish to be fair in this controversy, I feel that you will see and agree with my viewpoint in the handling of the matter.

Please go to work, Hugo, and let me hear from you. If you and I, who are friends and respect the rights of each other, cannot settle such a clear-cut issue, it certainly is a bad outlook for the good of the world to depend upon UNO.

(Testimony of Ove Fog.)

Awaiting your answer to this, without too much delay, I send my best regards.

Sincerely yours,

/s/ OVE FOG.

OF:M

cc: Jean Ravaud

[Endorsed]: Filed Dec. 29, 1948.

Mr. Farragher: I would like to read a portion of this before I examine the witness with reference to it. This is dated February 15, 1946, and is from Mr. Farragher to Mr. Jaburg: [104]

“In anticipation of Mr. Ravaud’s return and an early handling of the Harwood matter, I have, in the interest of fairness to the respective positions we have taken, again carefully reviewed the facts. In an effort to remove any remaining doubts in my mind, I presented the matter to my legal advisers, requesting an impartial opinion of my views. I quote below the letter just received from them:”

And then the letter as corrected, the letter that has just been introduced, is set out in this letter.

Q. When you said in this letter, Mr. Fog, that “In an effort to remove any remaining doubts in my mind, I presented the matter to my legal advisers, requesting an impartial opinion of my

(Testimony of Ove Fog.)

views," when you said that, didn't you mean to advise Mr. Jaburg that you had taken up the facts of the situation with your counsel and received his advice upon the matter?

A. May I see that letter?

(The document referred to was thereupon handed to the witness.)

A. Yes, I mean by that I was trying, from my end of it, to find out the fair way of looking upon the matter.

Q. What matter did you mean?

A. Whether I was entitled to a commission on Harwood whisky, or not.

Q. And you submitted your facts to Mr. tum Suden and he gave [105] you the opinion which you sent on to Mr. Jaburg, is that right?

A. That was right, yes.

Q. So when you went on to New York finally to sign up the documents, you had had legal advice as to your rights?

A. In a way, yes. But those letters that are presented to me here do not indicate, as you are indicating to me, that I had had long intimate discussion about the Harwood situation, because I do not recall that I had had a deep conversation with Mr. tum Suden about all the details of this matter. It was on the service, the technical things of it, as far as I remember, that my discussion with Mr. tum Suden was concerned, but I would be very happy if you would have Mr. tum Suden testify to

(Testimony of Ove Fog.)

whatever he knows about it, because that would clarify the situation in your mind.

Q. At least you will say now that when you said you had not had any legal advice upon the matter prior to taking up the settlement with Mr. Jaburg, you were wrong?

A. Yes, when you refer to those letters, but I still believe when I am talking about legal advice, I am talking about the legal advice pertaining to arbitration, or which way is the best to get a judge—the right judgment of our controversy.

Q. There had been no dispute between you and Mr. Jaburg whether you should sue or have arbitration, was there? You had not discussed it yet, had you? [106] A. In 1946?

Q. Yes. A. Sure.

Q. You had discussed the question of whether you should sue or arbitrate?

A. In—this is in—

Q. In your conversation in New York.

A. What date is this letter?

Q. I will withdraw that.

A. Will you kindly give me that letter?

Q. February 13, 1946.

A. That is right. That is earlier.

Q. I notice that you had in here—there is added and then stricken out the words, “Obviating the necessity of your going to New York.” Was that one of your considerations against arbitration, that the arbitration that you had arranged for was in New York? A. Yes.

(Testimony of Ove Fog.)

Q. On this question of arbitration, you had been discussing it back and forth for some months, hadn't you, since about September, 1945?

A. Well, the reason——

Q. No, but you had?

A. The reason that was thrown out——

The Court: All he is trying to find out is did he discuss [107] it or not.

The Witness: Yes.

The Court: If you answered the questions a little more simply we would get along, and then you can always make an explanation if you wish.

Q. (By Mr. Farraher): You kept pressing the matter, didn't you? A. Yes.

Q. You wanted an early arbitration. Before this complaint was prepared, you stated the facts of your case to Mr. tum Suden, didn't you? A. Yes.

Q. You brought him your files? A. Yes.

Q. He prepared a complaint based upon what you told him and you swore to it?

A. That is right.

Q. I call your attention to page 5 of the complaint, paragraph 9—paragraph 8 of page 3, and to this language:

“Defendant corporation falsely and fraudulently, and for the purpose of deceiving and misleading plaintiff, represented and maintained that defendant corporation had nothing to do with the importation or sale of said Harwood whisky in the said Western Division area.”

(Testimony of Ove Fog.)

That is not a fact, is it?

A. That is a fact. [108]

Q. You have already testified that the Harwood was clearing through Williams & Company, that you contacted Koerner to get shipments into your territory to your customers?

A. I know that R. C. Williams was importing Harwood whisky on behalf of the distillery into the United States. I do not know who imported it from there on into my territory. I understand that it goes from one State to another. That is referred to as importing, isn't that correct?

Q. I do not know.

A. I understand it is.

Q. Mr. Fog, you knew that the invoices for the very whisky, the Harwood whisky that came into your territory, came from the Williams & Company office; you knew that, didn't you?

A. That is right.

Q. And you knew that when your customers pressed you for some of it, you were instructed to contact Koerner to get it?

A. That is right.

Q. You now say, do you, that this statement is true, that you did not know that they had anything to do with the importation or sale of Harwood whisky in this territory?

A. That is right.

Q. Were there any salesmen selling Harwood whisky in this territory?

(Testimony of Ove Fog.)

A. I doubt it, but I understand there were salesmen around.

Q. You never ascertained that there were any salesmen of [109] Williams & Company, did you?

A. No.

If there were you would have known it, wouldn't you? A. Not necessarily.

Q. So far you never had any insinuation that any salesmen of Williams & Company were in your territory selling Harwood whisky? A. No.

Q. And you know that Harwood whisky was shipped direct from the distillery into your territory?

A. Yes, I believe that is the way it came.

Q. In other words, it did not go by way of New York?

A. No, that would be very natural.

Q. And you knew that the Williams & Company warehouse contained no Harwood whisky, isn't that true? A. How would I know?

Q. You do not know anything to the contrary, do you? A. No.

Q. Just what is it that you contend that Williams & Company did with this whisky and its effort to get it into the hands of people in your territory different from what you believed at the time this settlement was made?

A. For three years, or since 1944, when the Harwood situation came up, I have only learned by letter and by mouth that R. C. Williams did not

(Testimony of Ove Fog.)

handle and did not sell Harwood whisky, but [110] are only clearing it for the distillery in accommodation for having the franchise for metropolitan New York. Would you like to know what different I find now after January, 1948?

Q. Yes, tell us the difference.

A. Is that what you want me to do?

Q. Yes.

A. In 1948 I learned through my conversation with the Internal Revenue that R. C. Williams owns the merchandise, owns Harwood after it is imported to this country. They buy it at one price, mark it up, and sell it as a regular commercial transaction. In other words, R. C. Williams & Company are selling Harwood contrary to what they have stated they were doing. They were just clearing it before.

Q. Supposing that they were selling it and were just being paid a commission——

Mr. tum Suden: I think that is argumentative.

Mr. Farraher: I am trying to find the state of mind of this witness.

The Court: The trouble with that, Mr. Farraher, is that this type of question produces an argumentative answer, and it does not leave anything for the judge to decide.

Mr. Farraher: There is something to that.

Q. I will call your attention to page 5 of the complaint, paragraph 9: [111]

“Plaintiff never discovered that the state-

(Testimony of Ove Fog.)

ments and representations made to him by defendant to the effect that the defendant corporation had nothing to do with the sale and distribution of Harwood whisky in the said Western Division area and had not demanded or received any commissions or compensations for sales of such whisky so imported and sold."

Mr. tum Suden: What is the rest of it?

Mr. Farraher "Were false and untrue."

Mr. tum Suden: Until the latter part of January, 1948.

Q. (By Mr. Farraher): Until the latter part of January, 1948, according to your allegations, you did not know that Williams & Company had anything to do with the sale and distribution of Harwood whisky in your territory, is that so?

Mr. tum Suden: That is a broad statement, Mr. Farraher.

Mr. Farraher: It is just his language, Judge.

The Court: Don't you think again that whether or not the allegation of the complaint is sustained is a matter for the court to determine on the basis of the evidence, rather than to ask the witness?

Mr. Farraher: I think that is true. The only value to me is to have the witness' record of dodging it.

The Court: You should have, of course, a fairly wide latitude on cross-examination, but you can argue that yourself from the answers has already given, of course. [112]

(Testimony of Ove Fog.)

Mr. Farraher: This is preliminary, if your Honor please.

The Court: I would not restrict your right of cross-examination on it. You are dealing with a witness who wishes to argue, and when you ask that type of question you are going to get an argumentative answer. But you go ahead.

Mr. Farraher: I think your Honor is entirely correct. All I was fishing for was evasive answers.

Q. I notice, Mr. Fog, that nowhere in your complaint do you allege as part of the fraud—at least I have not found it—that at the time you signed that contract, you signed it on the representation of Mr. Jaburg that Williams & Company would not ship any goods into your territory under that contract, under the contract you made on March 8, 1946.

Mr. tum Suden: If it is not in there it is not in there.

The Witness: I beg your pardon? I do not know what you are asking.

Mr. tum Suden: He makes an observation and that is all. He does not ask a question.

Mr. Farraher: I thought I had a question mark.

The Court: Read the question.

(Record read.)

The Court: Of course, the contract speaks for itself, unless you had not finished your question.

Q. (By Mr. Farraher): Is that a fact?

The Court: I saw that already. You do not have

(Testimony of Ove Fog.)

to ask [113] the witness that. The contract referred to specific types of liquor only. It was not a general contract.

Mr. Farraher: That is right, and its provisions show specifically that he would get his commissions on liquor that was handled by the division.

The Court: Of course, that is a matter for argument. I do not think it will do much good to have the witness interpret the contract.

Mr. Farraher: No, I was just wondering whether it might have been an afterthought.

The Court: That, again, is a matter that you can argue. All attorneys have that hope, that sometime they will get a witness on cross-examination and he is going to admit he is wrong, and that he has no case, but that, in my experience, has not happened. It happens in the movies, sometimes.

Mr. Farraher: That is true, although I very often like to have the opposing witness say, "No," when naturally the answer would be "Yes."

The Court: We will recess until two o'clock.

(A recess was thereupon taken until two o'clock p.m. this date.) [114]

Afternoon Session, December 29, 1949

2:00 P.M.

OVE FOG

recalled.

Cross-Examination

(Resumed)

By Mr. Farraher:

Q. Mr. Fog, you were advised, were you not, that Mr. Jaburg was endeavoring to induce the Distillers to handle Harwood through the division in which you were employed? A. Yes.

Q. You have no reason to doubt that information? A. No.

Q. So far as you know, Mr. Jaburg did endeavor to arrange with the Distillers so that the Harwood goods shipped into the territory should go through your division? A. Yes.

Q. You had learned Mr. Koerner's connection with this matter. Did you interpret that to mean that Williams & Company—I am talking now before the settlement was made, before this meeting in which a settlement was made—did you assume that Williams & Company were shipping Harwood into your territory?

A. They were shipping it on behalf of the distillers. They were clearing it.

Q. Did you believe that Williams & Company was in fact shipping Harwood into this territory?

A. Will you define what you mean by "ship-

(Testimony of Ove Fog.)

ping''? If my answer [115] doesn't answer the question, I don't understand your reference.

Q. You have been in this liquor business a good many years and shipping is a pretty important part of that business, isn't it?

A. That is right.

Q. It has a regular definite meaning, shipping?

A. Yes.

Q. Did you prior to your discussions with Jaburg on the settlement know or believe that Williams & Company were shipping Harwood into your territory?

A. I was told that R. C. Williams was shipping it into this territory on behalf of the Distillers.

Q. And you believed that Williams & Company were shipping directly into this territory?

A. Not directly. What do we mean by directly?

Q. That Williams & Company was shipping directly into this territory.

A. Either you ship or you do not. What is directly? I don't understand that question.

Q. When this arbitration was about to be had, you prepared a statement of your view of the situation to present to the arbitration board, did you not?

A. I believe so.

Q. Have you a copy of that? [116]

Have you a copy of it, Mr. tum Suden?

Mr. tum Suden: May I see what you have there?

Q. (By Mr. Farraher): I will ask you to examine that and state whether or not that was prepared by you.

(Testimony of Ove Fog.)

A. Yes. I do not know if it was a letter that was sent to anybody. I think it was a draft that I made up.

Q. Was that prepared for submission to the arbitration board? A. No.

Q. I will call your attention to the last words.

A. It was made up at the time—yes, that is right, that is correct.

Q. Was that made up after consultation with your attorney? A. No.

Q. You prepared that on your own?

A. I, myself, yes, sir.

Q. I call your attention—and this was your view of the situation prior to the time that you met with Mr. Jaburg and discussed settlement of the matter?

A. Do you know the date of this?

Q. No, I have no date.

A. That must have been right after Mr. Jaburg had discussed, had suggested arbitration to me, after I had been back here and had the answer from Mr. tum Suden regarding arbitration, and then it had been established that it looked like we were going to have arbitration, and then I made this up. [117]

Q. I call your attention to the first page, at the bottom of the page, “Beginning in the autumn of 1944, the Wholesale Liquor Division of R. C. Williams & Company, Inc., made direct shipments into my territory of Harwood’s Canadian whisky, 90.4, in absolute violation of their agreement with me.”

A. Yes.

(Testimony of Ove Fog.)

Q. When I asked you if you considered prior to this settlement that Williams & Company made direct shipments, I was using the term as you used it here. A. Yes.

Q. What did you mean by that?

A. By that I mean R. C. Williams invoiced the merchandise into this. That is in my opinion a direct shipment. That is how I referred to this.

Q. From your observation of Mr. Koerner's activity and the information you got from your company, you drew the conclusion that Williams & Company, beginning in 1944, made direct shipments into your territory, is that right?

A. I don't know. I can't answer "Yes" or "No" on that, but I can explain the issue if I may.

Q. Can you answer that "Yes" or "No" and then explain, Mr. Fog?

A. If you will repeat.

Mr. Farraher: May I have the question read?

(Question read.)

A. Yes, that is right.

Q. (By Mr. Farraher): Now, Mr. Fog, I want to revert for a moment to the documents you signed that are dated March 8th. A. Yes.

Q. You will recall that when Mr. Ravaud sent you the documents to sign— A. Yes.

Q. In his letter of March 8, 1946—and I am referring to Plaintiff's Exhibit 17—he said, "As agreed between us, neither agreement is to be effective without the other." A. Yes.

(Testimony of Ove Fog.)

Q. You understood that, did you? That was the understanding?

A. That was the first time I heard about such a provision. That was never brought up at the time that Mr. Jaburg told me that he would try to get me the \$10,000. Anyway, I didn't pay much attention to it, because as far as I was concerned the issue was finished.

Q. Yes, but at the time you received this letter, which was shortly after March 8th, the matter was not finished because you did not finally sign——

A. No, it wasn't actually finished, but it was generally finished.

Q. You did not sign until the 26th of March, did you? A. Yes. [119]

Q. In the meantime you sent your letter of March 13th protesting the form of the agreement?

A. That is right.

Q. Your protest was that the agreement provided only for certain articles that were to pass through your hands, plus any other articles handled by the division? You objected to that, didn't you?

A. Yes, I think I have testified several times that I have always been assured that any merchandise shipped by R. C. Williams would go through my division.

Q. So when you sent your proposed amended form, you provided in your contract that anything shipped in by Williams & Company into this territory would come within your jurisdiction?

(Testimony of Ove Fog.)

A. I called attention that that is what we agreed upon in San Francisco.

Q. They refused to accept that amendment, did they not?

A. No, that was guaranteed. They didn't put it in the contract, but I was assured that that—had already been assured and it wasn't necessary to have it in the contract. As a matter of fact, I had it in writing. I had that guarantee in writing.

Q. You had that when?

A. I had that guarantee in writing from Mr. Jaburg.

Q. How long before?

A. I think that was in 1945.

Q. Yes, but in the beginning of 1946 you had not settled anything [120] yet, had you?

A. No, but we were trying to settle it.

Q. Exactly, and you suggested when this form of contract was submitted to you it should be made more comprehensive so as to cover shipments into the district by Williams & Company?

A. Yes, but that was not the big issue, as far as my principals are concerned, because they already had assured me that that was the foundation of my whole contract with R. C. Williams & Company.

Q. Then why did you want that put in your contract?

A. Because I thought it should be in the contract, and when I presented it to Mr. Ravaud he told me I already had that assurance—in fact, I had it in writing.

(Testimony of Ove Fog.)

Q. I call your attention, Mr. Fog, to the document which has been marked Plaintiff's Exhibit 17, which is the release upon which you were to receive the \$10,000. Will you hold that?

A. Yes.

Q. I call attention to this language:

"This will confirm our oral agreement of this week, to the effect that while we do not recognize any claim for any commissions on Harwood Whiskey sales in your territory, having previously advised you that Williams Importers has nothing to do with this product, we, in order to obviate any disagreement between us, will pay you the [121] sum of \$10,000 in full and final settlement of all claims which you have made and claims you might assert in the future on the sales of Harwood Whiskey in your territory, as long as this product is not directly handled by the Williams Importers Division."

Did you see that when you signed it?

A. Yes.

Q. What do you suppose they meant when they said, "As long as this product is not directly handled by Williams Importers Division?"

A. Because I had a guarantee, when it was handled by R. C. Williams, I would get my commission on it. But this draft of this thing, here, that is the way that R. C. Williams wanted to draw it up. When I got the \$10,000, I didn't make a

(Testimony of Ove Fog.)

deal with R. C. Williams. This was presented, like I made a deal with them. I finally wrote down and realized from Mr. Jaburg's assurance to me that I did not have no claim on Harwood whisky, and I got the \$10,000, and that has been thrown in, that I have settled a claim on my commission on Harwood's whisky for \$10,000, which is absolutely wrong.

Q. (By the Court): What were you getting the \$10,000 for?

A. I was getting the \$10,000 because I had suffered so much during these two or three years in my discussion with the company for getting the situation of Harwood whisky clarified, and Mr. Jaburg told me then that I did not have any [122] commission coming, and as I think I have testified before, I said, "Well, I do think that I should have something out of this because I have suffered quite a deal, and you are making quite a lot of money on it in New York on your wholesale."

Q. Do you mean you were suffering because you did not get your share of the proceeds on the Harwood whisky?

A. Not alone that, your Honor, but I was suffering a lot of heart—bad headaches in business out in my territory, due to the fact that I could not supply the people who helped me with the regular lines that at certain times was hard to sell. If they bought some of my other items, they wanted to be supplied.

Q. That was the same trouble everybody was

(Testimony of Ove Fog.)

having in those days. Everybody wanted whisky and couldn't get it. If you had whisky you could make them take a lot of other things along with it.

A. That is right, your Honor.

Q. That was the same headache that everybody had wasn't it?

A. Yes, but they didn't have the headache that I had, namely, the firm I am connected with are shipping it in to my territory but I am not making it available to the people that we do business with, leaving us no——

Q. You mean by that you could have done more business in the other lines of Williams & Company that you were handling if you were able to distribute some of that Harwood whisky, yourself, [123] is that what you mean?

A. Thousands of cases, your Honor, yes. The correspondence will show that I have lost carloads of merchandise because I couldn't supply Harwood whisky.

The Court: Excuse me for interrupting your examination. Go ahead.

Mr. Farraher: Perfectly all right, your Honor.

Q. Referring again to this language from this release: "As long as this product is not directly handled by Williams Importers Division—" Williams Importers Division never handled the product of Harwood, did they? A. No.

Q. I hand you what is marked Plaintiff's Exhibit 18, Mr. Fog, which is a letter of March 13,

(Testimony of Ove Fog.)

1946, from you to Mr. Ravaud. I will call your attention to this language at the bottom thereof: "I note the release form submitted only covers \$10,000, while it should read \$10,000 cash plus the \$3200 tax free at this time remaining on your books against me." What did that refer to?

A. Well, that referred to a debit I had with R. C. Williams.

Q. (By the Court): You mean you owed them \$32,000?

A. Yes.

Q. (By Mr. Farragher): As a matter of fact, shortly after you went to work for them you made a personal loan from them of \$15,000 without interest? [124]

A. That is right.

Q. And this is a remnant of that loan?

A. That is right.

Q. Do I understand from this that you were objecting to the release covering the \$10,000, the release form, because you had agreed upon more than \$10,000?

A. As far as I remember it, the amount that Mr. Jaburg would give me would amount to \$10,000, plus whatever money that I owed the company, and at that time that happened to be, as it says here, \$3200.

Q. You did not receive that, did you?

A. No.

Q. You received just the \$10,000?

A. That is right. Well, yes and no.

(Testimony of Ove Fog.)

Q. Before I get into a little longer piece of cross-examination here, there was some mention made of the fact that you were employed by Schenley and that you resigned your position with Schenley to come with this company.

A. That is right.

Q. And the company assured you the business here would improve and your compensation on a percentage basis would amount to something?

A. Yes, sir.

Q. And I think you said you were receiving \$400 a month from Schenley? [125]

A. No. Did I say that?

Q. How much were you receiving?

A. I don't remember, but it was \$400 or \$500, between there.

Q. There was no commission attached to it, was there?

A. No, but there was a bonus. I was the head of a division.

Q. You got a bonus of how much?

A. Well, I didn't get it, because I resigned before I had time enough to be there long enough.

Q. But you had no commissions on your sales?

A. No, Schenley don't give commission on sales.

Q. You took this job at \$350 a month.

A. This job, here?

Q. Yes. A. No.

Q. Your first salary was \$350?

A. Is that what it was? Then that is right.

Q. Approximately.

(Testimony of Ove Fog.)

A. That was the guarantee, what I could draw monthly, but that was a minor part of the remuneration I was going to get.

Q. As a matter of fact, you were employed in 1942, and in 1943 and 1944 the least you earned was \$21,000 working for this company?

A. That is possible. But may I call your attention, so the Court might understand the situation—

The Court: I prefer that you do not do that, because [126] then you are making arguments to me and I do not like to hear a case and have the witness make arguments.

The Witness: Pardon me.

Q. (By Mr. Farraher): You mentioned the fact that you resigned in 1947, April, 1947?

A. Yes.

Q. You were asked to resign, I think you said.

A. That is right.

Q. Was there much business in your line in 1947?

A. No, business was pretty small.

Q. Practically nothing, wasn't it?

A. It was very difficult, except it was possible to sell whisky.

Q. In other words, the stores had been so filled up by tie-in sales of wines and rums, you could sell whisky if you had it, but you could not sell rum?

A. The market was in distress.

Q. At the time you resigned that, you did that by written resignation, did you not? A. Yes.

(Testimony of Ove Fog.)

Q. To refresh your memory, I will show you a letter so as to fix the date. I will show you a letter of April 25, 1947, which purports to be a letter in which you resigned from Williams Importers. Does that fix the date, approximately?

A. I am quite sure, sir. [127]

Q. Was any settlement made with you at that time of any kind? A. Settlement?

Q. Yes.

A. Well, if you call it a settlement, I had a contract with them running for a year, and there was so many months to expire, and I got pay for those months; otherwise they paid my guarantee and then I got a settlement.

Q. I will show you, Mr. Fog, a letter dated April 26, 1947, from Williams Exporters to Fog. Do you recall the occasion of that?

A. Yes, if I may look at it. Yes. May I see it again, if you ask me some questions about it?

Q. Yes. Just let me take a glance. I will give it right back to you. I read this portion of it:

“Confirming our conversation, as special compensation for past services I am paying to you with this letter a check in the sum of \$6000. Furthermore, on January 2, 1948, we will pay you an additional amount of \$6000. These payments, in full settlement of our account with you, cover all past and future possible claims.”

You knew that provision was in there when you signed that document? A. All claims?

(Testimony of Ove Fog.)

Q. Yes.

A. Yes, I did. I had no claims against R. C. Williams except [128] after I learned that they misrepresented matters to me. Just then did I have a claim against Williams, and I first learned that in 1948. So why should I sign—I had no claim whatsoever against them.

Q. In that year the business, as you say, was very stagnant? A. Yes.

Q. This payment was made to you, \$6000, for your services up to date, \$6000 by way of a settlement?

A. Am I allowed to ask—Are you familiar with—

The Court: Mr. Farraher, some of these questions result in these argumentative answers.

Mr. Farraher: I will withdraw it, your Honor.

The Witness: I would like to—

The Court: No, no, I have enough trouble right now to sift the facts from this mass of argumentative statements to do a good job in deciding the case without hearing more.

Q. (By Mr. Farraher): On or about the 26th of March, referring to this settlement that was dated March 8th—the settlement finally was made on the 26th of March, was it not? Does that fix the date in your mind?

A. This is a payment of salary in accordance with the contract I had with R. C. Williams. It is not a settlement. It is just that they are making the payment of their remaining months.

(Testimony of Ove Fog.)

Q. I think you misunderstood. This is 1946.

A. Pardon me. Yes.

Q. I notice on here it says, "In full settlement in accordance with agreement dated March 8, 1946." You were paid by voucher checks, weren't you?

A. Yes.

Q. Do you recall that that was the claim——

A. I am not disputing that.

Q. Calling your attention to Plaintiff's Exhibit 14—this is the document, your Honor will recall, that was called the reassurance—this is addressed to you and says, "This will confirm our conversation held in December, 1943, at which time I gave you my verbal assurance that no merchandise would be shipped into your territory by R. C. Williams & Company, Inc., except through the Continental Import Division, now Williams Importers. Very truly yours, Williams Importers."

That is the document you referred to as giving you written assurance that they would not ship anything into your territory?

A. This is only a confirmation of it.

Q. Yes.

A. The assurance that nothing would be shipped into my territory was given to me at the time I was employed by Mr. Ravaud. Mr. Ravaud explained to me——

The Court: I think the witness has already answered the 130 question.

Q. (By Mr. Farraher): And that was in December, 1943?

A. This was.

(Testimony of Ove Fog.)

Q. Stated here. A. Oh, yes.

Q. The assurance was originally made in 1943 and this is a confirmation of it?

A. That is right.

Q. This in a confirmation of what was said in 1943; that was given you after your request of Mr. Jaburg that it be done?

A. After I asked Mr. Jaburg.

Q. That is right, and there was no hesitation on Mr. Jaburg's part to do that, was there?

A. No.

Q. And at the very time you did this, you were starting the arbitration proceedings for the purpose of settling your claim for the commissions on Harwood? A. Pardon me. I am starting?

Q. Yes, the negotiations for arbitration. I will withdraw that.

The Court: I think the record already shows it, Counsel.

Mr. Farraher: That is true, if your Honor please. I think that is about the end, but I would like to consult with counsel first.

The Court: Very well, go ahead.

Mr. Farraher: That is all. [131]

Redirect Examination

By Mr. tum Suden:

Q. Mr. Fog, at the time that you were served by Mr. Gaines, of the Internal Revenue Department, with the subpoena to produce certain letters,

(Testimony of Ove Fog.)

those were the letters which you had taken with you to New York? A. Yes.

Q. Did Mr. Gaines specify what letters he wanted?

A. Yes, he took out four or five letters.

Q. He went through all the letters you had and got what he wanted? A. Yes, sir.

Q. He did not specify that he wanted a letter of a certain date or anything of that kind?

A. No, but he showed me one particular letter that he had that he wanted information about, and I gave it to him.

Q. Did you take out these letters prior to resigning from R. C. Williams & Company, with any thought of bringing an action against R. C. Williams & Company?

A. I hadn't looked at the letters since I came back from New York in March. I have never even looked at them, but they happened to be in my drawer, in my desk.

Q. The first time that you had discussion to look for those letters was when you were subpoenaed?

A. The first time I had occasion to look for them was after I had been up to the Internal Revenue and I learned that R. C. [132] Williams was selling the merchandise.

Mr. Farragher: I would like that last stricken out, "I learned," as the conclusion of the witness.

The Court: Yes, it may go out.

The Witness: May I consult with Mr. tum Sunden?

(Testimony of Ove Fog.)

The Court: I think he wants to talk to you about something.

The Witness: I would like him to ask me some questions.

The Court: After he has finished asking you questions then you can consult with him. He may or may not want to follow your advice.

Q. (By Mr. tum Suden): Mr. Fog, in regard to this arbitration or suggested arbitration, when was arbitration first suggested to you? Do you recall the date?

A. Yes, arbitration was suggested to me in New York in 1945, in September, 1945, when Mr. Jaburg gave authorization to Mr. Ravaud to confirm the arrangement by which all merchandise should go through my office.

Q. And at that time did Mr. Jaburg state to you that there was no commission coming to you on Harwood?

A. Yes, he did.

Q. And he gave to you the reasoning?

A. Mr. Jaburg said that—the first thing he said was that Williams Importers didn't handle it. Then we called this to his attention and he said that is a different deal, we don't [133] sell it.

Q. Did you say anything to Mr. Jaburg in regard to arbitration as to your desire to consult an attorney?

A. When Mr. Jaburg suggested arbitration, I told him I didn't know much about arbitration in this country, but I would like to——

(Testimony of Ove Fog.)

The Court: I wonder if you couldn't ask the witness to answer those questions a little more directly. It is very difficult for me to follow. You ask a question that calls for a simple "Yes" or "No" answer. The witness gives a long answer and I finally find myself in the position of not knowing whether he answered that particular question or not.

(To the witness): Please listen to the questions and then answer them as best you can directly. This is for your own benefit.

(The last question was read.)

Q. (By the Court): You can answer that "Yes" or "No." Did you? A. Yes.

Q. Now, if he wants you to tell what you did tell the attorney, he will ask you that.

Q. (By Mr. tum Suden): Did you consult any attorney? A. Yes.

Q. Whom did you consult?

A. I consulted you.

Q. When you returned from New York? [134]

A. That is right.

Q. What inquiry did you make of me?

Mr. Farragher: Just a minute, if your Honor please. That certainly would be hearsay.

Mr. tum Suden: I do not think so.

The Court: It is a self-serving statement. It wouldn't make any difference what he asked you.

Q. (By Mr. tum Suden): Did you at the time you consulted me state the facts in regard to the

(Testimony of Ove Fog.)

sale of Harwood whisky by R. C. Williams as you knew them?

Mr. Farraher: We have no objection if he wants to ask for the conversation. We will waive the hearsay phase if counsel wants to bring out the conversation.

The Court: I do not understand whether you are objecting or not.

Mr. Farraher: No, I am withdrawing it.

Mr. tum Suden: I just want to bring out the conversation.

Q. What conversation did you have with me with regard to the Harwood question?

A. I came to you to ask your advice, what was the best way of finding a solution in my discussion with Mr. Jaburg, whether arbitration would be the right way to do it.

Q. Did you at that time know that R. C. Williams were selling and shipping Harwood whisky into your territory? A. I did not. [135]

Q. The information that you had with regard to Harwood whisky, is that set forth in the letter which you wrote to Mr. Ravaud, that long letter?

A. That is right.

Q. Did you see or meet any salesmen in your territory who were selling Harwood whisky?

A. No.

Q. How were sales of whisky generally made at that time?

A. You are referring to Harwood?

(Testimony of Ove Fog.)

Q. No, whisky.

A. Any whisky. It didn't take any salesmen to sell whisky at that time. They were all trying to get as much whisky as possible. So salesmen were kind of unnecessary.

Q. When you wrote that letter or statement headed "To Whom It May Concern," did you at that time know whether or not R. C. Williams were actually selling or shipping Harwood whisky into your territory? A. I did not know.

The Court: I am a little bit in the dark now. What statement is it that you are now referring to? Is it in evidence?

Mr. tum Suden: I do not think it is in evidence.

The Court: There is no way of identifying it then. I think I recall it is a statement he prepared, you said, for submission to arbitration.

Mr. Farraher: For submission to arbitration.

The Court: I think you had better have it marked for [136] identification so you will have something in the record to indicate what it is we are talking about.

Mr. Farraher: I have a copy we can have marked for identification.

Mr. tum Suden: It was not sent to anybody. It was just something he wrote for his own information.

The Court: I am only suggesting that there be something in the record to show what it is we are

(Testimony of Ove Fog.)

talking about. Otherwise we won't know at a later time. Mark it for identification.

(The document referred to was thereupon marked Defendant's Exhibit C For Identification.)

DEFENDANT'S EXHIBIT C

231 Sansome Street

To Whom It May Concern:

On May 1, 1942, the writer was employed by Continental Import Division, now Williams Importers, a Division of R. C. Williams & Co., Inc., New York, as West Coast Manager, having jurisdiction over the eleven Western States, Honolulu and Alaska.

I accepted my position with Williams Importers based on a gentleman's agreement, providing a minimum salary plus a stipulated commission per case on all items sold and shipped into the territories allotted to me. My commission agreement reads as follows and is payable monthly for the previous month's number of cases sold, paid for and shipped into my territory:

From 1,000 to 5,000 Cases—.10 a case.

From 5,000 to 10,000 Cases—.15 a case.

From 10,000 to 15,000 Cases—.20 a case.

Over 15,000 Cases—.25 a case.

Beginning in the autumn of 1944, the Wholesale Liquor Division of R. C. Williams & Co., Inc., made

(Testimony of Ove Fog.)

direct shipments into my territories of Harwood's Canadian Whiskey, 90.4, in absolute violation of their agreement with me. All efforts to obtain the commission rightfully due me on such shipments have so far been in vain, and my Company's refusal to adhere to our agreement as entered into has resulted in this case being brought before your Honorable Board.

In September, 1945, when Mr. Jean Ravaud returned from Europe, I traveled to New York for a conference of the matter with Mr. Ravaud and Mr. Hugo Jaburg, President of R. C. Williams & Co., Inc., i.e., Williams Importers.

In this conference I made again a specific demand for commission on all cases of Harwood's Whiskeys already shipped, or which might in the future be shipped into my territories, in accordance with my gentleman's agreement with them. My efforts to settle this matter again failed. Then Mr. Jaburg suggested to me that we submit our controversy for arbitration. I had no choice but to accept this suggestion, though I was at a complete loss to understand any sound reason for arbitration of a matter so obviously plain. Our agreement has been in effect and functioning since 1942 on a basis which has proven satisfactory and agreeable to all concerned until this controversy arose concerning the Harwood's Whiskey.

The Harwood sales are a direct repetition of a previous occurrence (this time pertaining to Rum)

(Testimony of Ove Fog.)

which came up in the autumn of 1943 and was settled favorably. Therefore, you may find my following writing, referring to this previous issue, most important to your judging of this present matter.

With reference to the previous controversy, allow me to explain that in the early autumn of 1943 the Wholesale Liquor Division of R. C. Williams & Co., Inc., made direct disposal of a couple of carloads of Rum into part of this territory, namely, San Francisco. When Mr. Ravaud shortly after this visited me in San Francisco I brought this matter to his attention and told him that this transaction, to my mind, was a definite violation of our agreement, and absolutely contrary to my understanding of this agreement. Mr. Ravaud stated that he fully agreed with me and that he would take this matter up with our President, Mr. Hugo Jaburg.

In late September, 1943, when I again met Mr. Ravaud, he advised me that he had taken the matter up with Mr. Jaburg and that Mr. Jaburg had guaranteed him that such a thing would not happen again; that positively no further merchandise would at any time shipped into any part of my territories by R. C. Williams & Co., Inc., except through the Continental Import Division, now Williams Importers.

In other words, had there been any possible doubt as to the mutual understanding of our agreement, there was most certainly ample opportunity to have corrected it at this time. Accordingly, it is my con-

(Testimony of Ove Fog.)

tention that this issue, which now involves Harwood's Whiskey, was tested and settled when the matter of the Rum sales was decided in my favor and my principals agreed that my contract would stand as originally entered into.

When I acceded to Mr. Jaburg's desire to arbitrate our controversy, I did so with the understanding that I was to receive from them written confirmation of our verbal agreement to the previously mentioned assurance given me by Mr. Jean Ravaud on behalf of Mr. Jaburg. This confirmation given me by letter, dated September 13, 1945, (signed by Jean Ravaud) reads as follows, quote:

This will confirm our conversation held in September, 1943, at which time I gave you my verbal assurance that no merchandise would be shipped into your territory by R. C. Williams & Co., Inc., except through the Continental Import Division, now Williams Importers. Unquote.

For your further help in judging this controversy, I am enclosing copy of a letter I received from my firm, dated February 6, 1945, and my answer, addressed to Mr. Jean Ravaud, dated February 12, 1945.

If we compare the Harwood's issue with the Rum issue we will find that the commercial and ethical principles involved are identical. In the Rum matter, my employers judged my claim a correct one. In the Harwood's case (which is identical with the Rum case) they reverse their decision; and a man

(Testimony of Ove Fog.)

can hardly be expected to accept such an inconsistent ruling, which interferes so drastically with his livelihood.

I refuse to believe this matter would have ever reached the point of arbitration had not Mr. Jaburg and Mr. Ravaud been occupied with other matters.

The issue involved seems to me so clear cut that unless your Honorable Board requests additional details from me to substantiate my claim (which amounts to 25 cts. commission for every case of Harwood's Whiskey already shipped, or which will be shipped, into my territories) I shall refrain from further comments.

I base my claim solely upon my original 1942 agreement, and the confirmation of this agreement, as substantiated by my principals in December, 1943.

Mr. tum Suden: He might point out that that paper was not communicated to anybody. It was simply something he wrote out, his reasons or arguments.

The Court: I understood that. All I was pointing out was there was nothing in the record to show what you were referring to in the question you put to the witness.

Mr. Farraher: It was, however, prepared for the purpose of submitting it to arbitration.

The Court: You read a paragraph from it, but

(Testimony of Ove Fog.)

still the statement, itself, which counsel referred to as being headed, "To Whom It May Concern," is meaningless unless it is identified in the record.

Mr. Farraher: That is right, your Honor, yes.

The Court: Go ahead.

Mr. tum Suden: May I see that document?

The Court: That is my only purpose in interfering.

Q. (By Mr. tum Suden): Referring to the bottom of that page, you mention in this exhibit Defendant's C For Identification a statement that R. C. Williams made direct shipments into your territory of Harwood's whisky and in violation "of your agreement with me." Did you at that time know that to be a fact, or was that your conclusion?

A. That was my conclusion.

Q. That was the basis of your contention?

A. That is right, but I was told by Mr. Jaburg that they were not.

Q. This document that you prepared was an argument, was that not it?

A. That is correct.

Q. And your viewpoints?

A. That is right.

Q. Did it necessarily——

The Court: I can't follow this witness on that.

Q. Do you mean to say you made that statement for the purpose of getting some benefit to yourself without knowing whether or not that statement was true? You said in the statement that

(Testimony of Ove Fog.)

they were making shipments here in California. Now, you made that statement in the hope of getting some benefit to [138] yourself. Were you telling the truth when you said that, or were you just pulling that out of the air?

A. When I wrote this, it was my belief that they were shipping it.

Q. Then you must have had some information. You did not have a dream some night when you were in bed, did you?

A. I had no information about it excepting what I already had been——

Q. You did not know whether that was true, or not, you mean? A. I did not.

Mr. tum Suden: This was a statement, as I understand it, that he intended to submit as his theory for why there should be arbitration.

The Court: All right, go ahead.

Mr. Farraher: To the arbitration board.

Q. (By Mr. tum Suden): When you resigned from R. C. Williams, that was done at their request, was it? A. Yes, sir.

Q. When you resigned R. C. Williams agreed to make two payments of \$6000 each to you, when you resigned in 1947?

A. No, I asked them to make it that way.

Q. That was the balance of your yearly salary?

A. That is right.

Q. And there was no provision for commission, on sales?

A. No, it was just fulfilling their contract. [139]

(Testimony of Ove Fog.)

Q. And the settlement that you made and signed at that time covered that particular contract, did it not? A. Yes.

Q. When you signed that document in which you said, "Settlement in full for all future claims——"

A. Yes, sir.

Q. Did that refer only to the period of that contract?

Mr. Farraher: We object to calling for the conclusion of the witness. The document, itself, speaks for itself.

The Court: I think that objection is good, Counsel.

Q. (By Mr. tum Suden): At the time you signed that receipt for that money, did you at that time know that R. C. Williams were shipping and selling Harwood whisky in your territory?

A. I did not.

Q. Referring again to Defendant's Exhibit C For Identification, referring to the statement that you had in this memoranda that Williams & Company were making direct shipments into your territory, can you fix the time that you wrote that?

A. That must have been the time after I came back from New York and Mr. Jaburg suggested we should have an opportunity, and I took it up with you.

Q. Why did you make that statement in this document?

A. I made that statement because at that time

(Testimony of Ove Fog.)

I believed that they were shipping it into my territory.

Q. Why did you believe that? [140]

A. Because Harwood was coming into my territories, and in talking with my different customers it looked sensible that they were shipping it in.

Q. At that time you believed they were shipping it in?

A. At that time I believed it.

Q. Subsequent to that time did you take it up again with officers of R. C. Williams & Company?

A. Yes, when I came back Mr. Jaburg came out here, I think it was in February——

Q. The Palace Hotel?

A. The Palace Hotel—he then convinced me that they were not selling it, and that was the time when the whole thing was called off.

Q. In other words, he satisfied you——

A. He satisfied me again it was not——

Q. Well, now—go ahead.

A. He convinced me I had no commission coming and they were not selling it. I think I have testified to that.

Mr. Farraher: I move to strike out what he was convinced.

The Court: That objection is good. It will be sustained.

Q. (By Mr. tum Suden): Did he make a statement to you at that time in regard to the method that R. C. Williams followed in handling Harwood whisky?

A. Here in San Francisco?

(Testimony of Ove Fog.)

Q. Subsequent to preparing that document, either in San Francisco [141] or in New York, or any other place.

A. Do you mean before I wrote that document?

Q. No, afterwards, after you wrote that document.

A. After I wrote that document he told me they were not handling it.

Q. (By Mr. Farraher): Did he say, "he"?

The Witness: That they were not handling it.

Q. (By Mr. tum Suden): And that was reiterated at the time you were in New York and the documents of March 8th were signed?

A. Yes, that is right.

Mr. tum Suden: I think that is all.

Recross-Examination

By Mr. Farraher:

Q. At the time you made the statement that Williams & Company were making direct shipments, you had had all of your discussions with the company, both with Mr. Jaburg and with Mr. Ravaud and with Mr. Koerner, as to the methods of handling Harwood whisky in this territory, hadn't you?

A. I never did get any information of handling it, outside they told me they were clearing it. That is the reason why this case is in court today.

Q. Just what convinced you at the time you prepared this exhibit C that Williams & Company were shipping direct into this territory? Just what?

(Testimony of Ove Fog.)

A. The fact that the Harwood whisky was coming in and the [142] Harwood whisky was invoiced by R. C. Williams & Company.

Q. That is what made you think it was a direct shipment? A. That is right.

Q. You interpreted those facts to constitute a direct shipment? A. That is right.

Q. At the time you made the settlement with Mr. Jaburg you knew then as well, didn't you, that the whisky that was shipped in here was invoiced by Williams & Company?

A. I knew it was invoiced, but I was told it was on behalf of the Distillery and R. C. Williams was clearing it. They had never used the word, they never told me at no time, which would have been very simple, that they had sold the merchandise, just like they sold it in metropolitan New York. Then there never would have been any dispute. That word had never been used.

Q. But they did convince you prior to the time you prepared Exhibit C that they were shipping Harwood into this territory?

A. Do you mean before?

Q. Certainly, before you prepared this exhibit in which you say they are shipping into this territory.

A. That they what? That they convinced me?

(Question read.)

A. No, they didn't convince me. It was a fact that Harwood was coming into this territory, but it

(Testimony of Ove Fog.)

was shipped into this territory by R. C. Williams on behalf of the Distillery. [143]

Q. And you knew it was invoiced by R. C. Williams & Company and was in fact shipped by the distiller from Vancouver into this territory? You knew that?

A. I knew it was invoiced by R. C. Williams, yes.

Q. And you knew it was being shipped from the Vancouver distillery, didn't you?

A. Yes, sir.

Q. And you knew both of those facts at the time you made the settlement? A. Yes.

Q. You made one other statement there: You said that after you prepared this you had a talk with someone who told you they were not handling it. Who was that? You testified just a moment ago that after preparing this Exhibit C you saw someone and he told you that they were not handling Harwood.

A. I understand the question. I am referring to my conversation in the Palace Hotel.

Q. With whom?

A. With Mr. Jaburg and Mr. Ravaud. I think I have testified already to that.

Q. What did you mean by "handling"? What did you interpret the word "handling" to mean when they told you they were not handling Harwood?

A. That was the term they used, and that means

(Testimony of Ove Fog.)

again they had just cleared it. In other words, they never brought it [144] down to the point, which would have been very plain, to say "We do sell it." They never used that word.

Q. Did you ever ask them whether or not they shipped any Harwood into this country at any time?

A. If they shipped?

Q. Yes, using your word "shipped." Did you ever ask them if they shipped Harwood into this territory?

A. No, I used the word "selling," because it was shipped in here we know.

Q. (By the Court): Let me ask you this question: At all of the times we are discussing here this whisky came from Canada to the wholesalers in California and other parts of your territory directly?

A. Yes.

Q. The whisky, itself?

A. That is correct.

Q. The defendant, R. C. Williams & Company, invoiced, sent out invoices to the wholesalers, is that right?

A. That is correct.

Q. You say that if, for example, the defendant had paid \$20 a case to the distiller and invoiced at \$21.50 a case to the wholesaler, that that would be different than if the distiller paid the defendant \$1.50 for invoicing it a case, is that what you are intending to state?

A. Yes, your Honor. [145]

Q. You have been attempting to make that dis-

(Testimony of Ove Fog.)

inction, I gather, from your answers that you have been making to the attorneys right now, is that right? A. May I try to explain that?

Q. I do not want you to explain it. See if you can answer my question: Is that the distinction that you are making, or have been attempting to make? I am not trying to help you out. I am trying to find out what is in your mind.

A. The distinction I am getting at is that R. C. Williams, if they are clearing the merchandise for the distillery, which they claim they did, then they are acting as an agent, just like I am acting here.

Q. All I am trying to find out is the distinction that you are making in the difference between the R. C. Williams & Company paying the full purchase price of the whisky to the distiller, adding \$1.50 to it, and invoicing to the purchaser, and the payment of \$1.50 commission by the distillery to the defendant for the invoicing process that the defendant adopted? Is that the distinction that you are making? If it is, just admit it, because I am familiar with those processes. There isn't anything mysterious to me. The distinction you are making is the difference between the defendant paying the full purchase price and adding a profit or an additional amount when they sell it, and that differential being paid as a commission directly: That is the distinction that you are making? [146]

A. That is the distinction.

Q. And if they got a commission from the dis-

(Testimony of Ove Fog.)

tiller, then you do not think you are entitled to any part of the \$1.50 that they would get as a commission for their services in billing, whereas if they paid the price themselves and then rebilled to the wholesaler for the difference of \$1.50, you would be entitled to your commission?

A. That is correct.

Q. That is the point you are making?

A. That is the point.

Mr. Farragher: Could I have one more question?

The Court: Yes, certainly.

Q. (By Mr. Farragher): You knew at all times from the fall of 1944 that Williams & Company were the importers of the whisky, didn't you?

A. As soon as the merchandise——

Q. Answer "Yes" or "No." You can answer that "Yes" or "No," please.

A. I knew in 1944, when the first shipments came in here, it was imported by R. C. Williams. That is when I learned that R. C. Williams was the importer.

Q. You knew that at all times?

A. As soon as it appeared on the market.

The Court: Anything else with the witness?

Mr. tum Suden: Not from this witness, no. If the Court [147] pleases, in connection with this case I wish to call attention to the fact that in the answer of the defendants they admit, on page 4, the allegations of the complaint, paragraph 7 of the answer, they admit the selling of the whisky in the

(Testimony of Ove Fog.)

United States. They admit the amounts set forth in the complaint, except as to the amounts which were to have been sold outside of certain states, and they said that they did not sell in excess of 96,592 cases of Harwood whisky in the States other than California, Nevada, Arizona, and the Territory of Alaska. Then going down to paragraph 8 of the answer, they admit that for more than a year prior to March 8, 1946, the controversy was pending, but in this connection they allege that the whisky was not sold by plaintiff or through the Continental Import Division, or said Williams Importers. They then proceed on in that paragraph and state at line 4:

“In this connection defendant alleges that it did import and sell throughout said area Harwood whisky and did receive a profit on the sale thereof,”

but draw the distinction that the sales were made through the department other than Continental Import Division. The allegations admit the sale of the liquor by R. C. Williams. I assume that there is no necessity of proving that fact.

The Court: Well, except they admit it up to 96,592.

Mr. tum Suden: Except as to the amount, they admit the sale of 405,000 cases in Nevada, California, Oregon and [148] Washington, I think it is. However, I think it might be helpful to the court, in spite of the admissions of the answer, that the

(Testimony of Ove Fog.)

contract by which Harwood functioned in the handling of this whisky might be offered in evidence, and I have asked Mr. Jacobs for a copy of that contract, and I have received a copy of that contract, and in order to give the court the information, I would like to offer that contract in evidence.

The Court: A contract between the defendant, R. C. Williams & Company, and the Harwood Distillery?

Mr. tum Suden: It appears from that contract, if it is the correct contract, that it is a contract between the defendant and a corporation in Cuba, which claims to have had the complete control of the sale of Harwood whisky throughout the world.

The Court: For the Harwood Canadian Distillery?

Mr. tum Suden: And this contract appoints R. C. Williams the selling agent for it in the United States, fixing the prices and their commission.

The Court: Any objection to the contract?

Mr. Farraher: No, we have the original here. There is no objection to it. We are handing Counsel, if your Honor please, the original of an agreement dated April 18, 1944, between Agencias Distiladores, S. A., or Distillers Agencies, Inc., a corporation, on the one part, and R. C. Williams & Company, Inc., upon the other, executed by the officers of each corporation, and a supplemental contract in letter form [149] dated April 20, 1944, addressed to Agents, Agencias Distiladores, S. A.,

(Testimony of Ove Fog.)

signed Williams & Company by its officers, and approved by the Agencias Distiladores, through its officers.

The Court: Do you want them marked as one exhibit?

Mr. tum Suden: I think they might be marked as one exhibit, if the Court please.

(The agreements referred to were received in evidence and marked Plaintiff's Exhibit 20.)

PLAINTIFF'S EXHIBIT No. 20

Agencias Distiladores, S. A.

(Distillers Agencies, Inc.)

and

R. C. Williams & Company, Inc.

AGREEMENT

Parties.

Memorandum of Agreement made this 18th day of April, 1944, by and between Agencias Distiladores, S. A. (Distillers Agencies, Inc.), a corporation duly organized under the laws of the Republic of Cuba, of 411 Aguiar Street, Havana, Cuba, hereinafter called "Supplier," and R. C. Williams & Company, Inc., a corporation duly organized under the laws of the State of New York, U. S. A., of 265 Tenth Avenue, New York City, New York, hereinafter called "Agent."

(Testimony of Ove Fog.)

Witnesseth:

Whereas, the Supplier is the exclusive agent of Duncan Harwood & Co., Ltd., of Vancouver, Canada, for the entire world for the sale and distribution of the brand "Harwood's," a blended Canadian whiskey of 90.4 proof, distilled, blended and bottled by the said Duncan Harwood & Co., Ltd., under the supervision of the Canadian Government; and

Whereas, it is the intention of the parties hereto that the Supplier appoint the Agent as its exclusive sales and distributing agent for the sale of the said brand of "Harwood's" in the United States of America, subject to the terms and conditions of this agreement;

Now, Therefore, in consideration of these presents, and for other good and valuable considerations, the parties hereto mutually covenant and agree as follows:

Authority of Supplier to Appoint Agent.

First: The Supplier warrants and represents that it is the exclusive agent of Duncan Harwood & Co., Ltd., Vancouver, British Columbia, Canada, for the sale and distribution of whiskey under the brand name of "Harwood's" for the entire world and has the power and authority to enter into this contract with the Agent and to appoint the Agent as exclusive sales and distributing agent for the territory and term hereinafter set forth.

(Testimony of Ove Fog.)

Second: The Agent warrants and represents that:

Authority of O. P. A. Prices.

(a) it has or will obtain the necessary permits and licenses to enable it to carry out the agency herein granted and further

(b) it has obtained an order from the Office of Price Administration dated March 14, 1944 (Order No. 34) setting forth the maximum prices for sales to wholesalers, monopoly states and retailers for the sale of said "Harwood's" Whiskey, which approved prices warrant the prices set forth in this agreement.

Exclusive Agency and Territory.

Third: The Supplier appoints the Agent as its exclusive agent to distribute the brand of blended Canadian Whiskey under the label of "Harwood's" for the territory comprising the United States of America, that is, the states in which the distribution and sale of alcoholic beverages is now and/or will in the future be permitted and licensed.

Term.

Fourth: This agreement shall terminate and end with the abolition or discontinuance of the Office of Price Administration in the United States, or when the Office of Price Administration relinquishes and ceases pricing of imported whiskies, whichever is the sooner. The period from the date of this agree-

(Testimony of Ove Fog.)

ment until the happening of either of such contingencies shall be the term of this agreement.

Price.

Fifth: The price to be paid by the Agent to the Supplier for the said "Harwood's" Canadian Whiskey shall be \$19.05 per case of 12 bottles of fifths (four-fifths American quarts) at 90.4 proof, f.o.b. Vancouver, British Columbia, Canada, in funds of the United States of America, net, without discount for quantity or payment. It is agreed that the Supplier will give no commissions, allowance or remuneration of any kind to the Agent, it being the intention and agreement of the parties hereto that the Agent will make the profits hereinafter set forth as and for such commissions, allowances or remunerations for its efforts and services.

Strip Stamps.

Sixth: Strip stamps, necessary and requisite under the laws of the United States, will be furnished by and at the cost of the Agent.

Passing of Title.

Seventh: It is understood and agreed that title to all shipments from the Supplier to the Agent shall pass f.o.b. Vancouver, Canada, and the Agent assumes all risk of loss after the merchandise is loaded on railroad cars at Vancouver, B. C., and a railroad bill of lading is issued for such shipment. Importations in Name of Agent.

(Testimony of Ove Fog.)

Eighth: All importations into the United States shall be in the name of the Agent which shall make all customs entries therefor. The Supplier, at its cost and expense, shall attach a strip or add to the label words as follows:

“Imported by R. C. Williams & Co., Inc.

265 Tenth Avenue

New York, N. Y.

Sole Agent for the U. S.”

Where State Laws make it necessary to affix a strip or label showing the name of the licensee in the said state, same shall be affixed by the Supplier at the Supplier's cost and expense, on the written instructions of the Agent, such strip or label to contain the name of the wholesale customer of the Agent in such state. Whenever whiskey is already cased, in such event the customer of the Agent, pursuant to the laws of the State in which the customer is located, shall affix his own strip or label at his own cost and expense.

Posting of Schedules, etc.

Ninth: The Agent shall post schedules of prices or other schedules, labels or listings wherever necessary and required and shall conform to all rules, regulations and orders of the various federal, state and other bodies having jurisdiction over the activities of the Agent in carrying out the terms of this agreement and, further, that this agreement shall be subject to all such rules, regulations and orders.

(Testimony of Ove Fog.)

Minimum Quantity for Retail Distribution by
Agent.

Tenth: It is understood and agreed that the Agent is to purchase and receive a minimum of 121½% of all the "Harwood's" brand as aforesaid shipped into the United States, such minimum of 121½% to be sold and distributed by the Agent to its retail customers in Metropolitan New York City. An additional quantity of a minimum of 121½% is to be sold and distributed to wholesalers in the State of New York (other than the Agent) and the balance of 75% is to be sold and distributed to wholesalers and monopoly states in the remainder of the territory hereinbefore set forth (the State of New York excepted).

Eleventh: Notwithstanding the maximum prices set forth in the order of the Office of Price Administration hereinbefore set forth, the Agent agrees that it will make sales of "Harwood's" to wholesalers on the following basis:

\$20.77, net, per case, f.o.b. Vancouver, Canada, in bond, which price is made up of the total of

- (a) cost of \$19.05
- (b) strip stamps of 12c, and
- (c) profit of \$1.60

and that all sales to wholesalers will be at a (stop) price not to exceed the said price of \$20.77 per case; the wholesaler (when goods are already cased) to affix State Stamps where required, at his own cost and expense.

(Testimony of Ove Fog.)

Sales to monopoly states shall be made on the same basis, except for an increase to cover cash discount and the cost of affixing state seals where necessary and required.

Prices to Retailers in New York City Territory.

Twelfth: Notwithstanding the maximum prices set forth in the order of the Office of Price Administration hereinbefore set forth, the Agent agrees that it will make sales of "Harwood's" to retailers in Metropolitan New York City territory on the basis of the price to wholesalers set forth in paragraph "Eleventh" hereof, plus railroad freight from Vancouver, Canada, to New York City, customs duties and Federal Internal Revenue Taxes (except the increase in such taxes effective April 1, 1944, which shall be billed as a separate item and on which no profit or markup shall be taken), and New York State Excise Taxes, plus the wholesale profit of 15% on the total of the foregoing; and that all sales by the Agent to retailers in Metropolitan New York City territory will not exceed the price based on the foregoing formula. On all such retail sales, the Agent will pay all commissions and selling expenses for its own account and at its cost and expense, it being understood and agreed that the importer's profit of \$1.60 per case, plus the wholesaler's profit or markup of 15% will be the total profit or remuneration to be received by it.

(Testimony of Ove Fog.)

Terms of Payment.

Thirteenth: The Agent agrees to open a revolving irrevocable letter of credit for \$200,000.00 in favor of the Supplier in the Chase National Bank of New York, main office, or such other bank mutually agreed upon by the parties hereto. On all shipments made by the Supplier, or its principal Duncan Harwood & Co., Ltd., of Vancouver, Canada, payment shall be made by the Agent through the medium of the said letter of credit against the following documents:

Commercial Invoice, Consular Invoice,
Railroad Bill of Lading, and 3 days Sight
Draft.

As each shipment is made and the draft paid, the letter of credit shall thereupon be brought up to \$200,000.00 by the Agent. It is understood that the Agent shall require sight letters of credit, irrevocable for 90 days and payable against documents from its wholesale customers. In the event that any shipment is in excess of the sum of \$200,000.00, then and in such event payment of the excess shall be by three (3) days sight draft, to which draft are attached the documents hereinbefore specified in this paragraph.

Notices.

Fourteenth: All notices shall be sent to the Sup-

(Testimony of Ove Fog.)

plier addressed to it at the address hereinbefore set forth and a copy to be sent to H. H. Klein at 3610 Clarinth Road, Baltimore, Maryland, and all notices to the Agent shall be sent to it at its address hereinbefore set forth—265 Tenth Avenue, New York City, N. Y.

Subject Clause Acts of God, etc.

Fifteenth: All orders given pursuant to the terms of this agreement are accepted subject to the ability of the Supplier and the ability of its principal, Duncan Harwood & Co., Ltd., to perform and should the Supplier or its principal be unable to complete the same by act of God, or the elements, public authority, public enemy, embargoes, obstruction to navigation, strikes, (stop) insurrection, fire, floods, unusual delay of common carriers, unavoidable casualties, inability to procure materials or supplies, order of requisition, request, regulation or order of any Government authority or other causes beyond the control of the Supplier or its principal, whether or not the cause be of the same class or kind as those enumerated above, which may directly or indirectly cause the Supplier or its principal to be unable to deliver or ship or prevent the Supplier's principal from manufacturing, blending or bottling the merchandise covered herein, thence any order or any part thereof remaining undelivered shall be cancelled without penalties or damage, and the Agent shall be entitled to the return of any de-

(Testimony of Ove Fog.)

posits or the release of any letters of credit if such have been established, and all or such undelivered portion of any order shall be null and void as though never having existed. In the event the Agent is prevented from performing the terms and conditions of the agreement by it to be performed due to any disability imposed by laws, rules or regulations of the United States, State, or City Governments, or any departments or agencies thereof, then to the extent of such disability or disabilities performance on the Agent's part as provided for herein shall be excused and Agent shall not be liable for such non-performance.

Arbitration.

Sixteenth: In the event of a dispute between the parties hereto regarding any of the terms of this agreement, each of the said parties shall appoint one arbitrator, and the two arbitrators so named to nominate and appoint a third arbitrator, and the three arbitrators so named shall determine the controversy presented to them pursuant to the Arbitration Laws of the State of New York, in such cases made and provided.

Seventeenth: This agreement constitutes the entire understanding between the parties hereto, and no amendments or changes thereof shall be valid and binding unless the same is in writing, signed by both of the parties hereto.

In Witness Whereof, the parties hereto have here-

(Testimony of Ove Fog.)

unto set their hands and seals the day and year hereinafter set forth.

Signed in New York City this 18 day of April, 1944.

R. C. WILLIAMS & COMPANY,
INC.

By /s/ W. E. MENGELUCE,
Vice Pres.

Signed in Havana, Cuba, this 8th day of May, 1944.

AGENCIAS DISTILADORES,
S. A.

By /s/ F. GURRI.

[Letterhead] R. C. Williams & Co., Inc.

April 20, 1944.

Agencias Distiladores, S.A.
411 Aguiar Street
Havana, Cuba

Gentlemen:

Supplementing the agreement between us made the 18th day of April, 1944, and it being the desire of the parties that the merchandise be marketed through the proper channels and in the proper manner in order to establish the business on a sound financial basis, it is further agreed as follows:

1. Out of the profit of \$1.60 per case as provided for in the agreement, the Agent agrees that

(Testimony of Ove Fog.)

it will pay a brokerage or selling commission of not in excess of 60c per case to brokers or selling agents selected by it but no such broker or selling agent will be selected by the Agent unless and until the written approval of the Supplier is first obtained as to each such broker or selling agent.

2. The Agent will make no sales to wholesalers in monopoly states without first having received written approval of the Supplier. The Supplier shall have the refusal of the customer or the quantity sold by the Agent to any wholesaler or monopoly state.

3. After the Agent (stop) has accepted and paid for its own account for sales to retailers for 12,500 cases or $12\frac{1}{2}\%$ of the total of all shipments by the Supplier or its Principal, which ever is greater, then and in such event the Agent shall not be required to accept any further shipments. On all sales in excess of the above 12,500 cases or $12\frac{1}{2}\%$, whichever is greater, Agent shall not be compelled to pay for same unless and until the Agent shall have received from its customer a sight letter of credit irrevocable for 90 days in favor of the Agent. The Supplier or its Principal is to make shipment of any goods so sold to Agent's wholesale customers on open credit to Agent by forwarding the documents provided for in the agreement and with three (3) days sight draft to the bank and payment thereof is to be made by the Agent to the bank in accordance with such sight draft.

(Testimony of Ove Fog.)

4. The revolving letter of credit referred to in paragraph Thirteenth of the agreement is to be established by the Agent on or about May 8, 1944, upon receipt of acceptance of order for 100,000 cases.

5. All payments for merchandise are to be made in New York City.

Will you please sign the duplicate original of this letter where indicated and return to us.

Very truly yours,

R. C. WILLIAMS & COMPANY,
INC.

By /s/ W. E. MENGELUCE,
Vice Pres.

The above is approved and accepted.

AGENCIAS DISTILADORES,
S.A.

By /s/ F. GURRI.

[Endorsed]: Filed Dec. 29, 1948.

Mr. tum Suden: May I make some references to portions of this contract?

The Court: Are you going to put on any other witnesses?

Mr. tum Suden: No further witnesses.

The Court: Whatever you wish to call my attention to. [150]

Mr. tum Suden: If the Court please, I would like to point out one or two provisions of this contract. This contract is made on the 18th day of April, 1944, between the *Agencias Distiladores, S.A.* or *Distillers Agencies, Inc.*, a corporation, duly organized under the laws of the Republic of Cuba, called the supplier, and *R. C. Williams & Company, Inc.*, a corporation, hereinafter called the agent, and it recites that:

“Whereas, the Supplier is the exclusive agent of *Duncan Harwood & Co., Ltd.*, of Vancouver, Canada, for the entire world for the sale and distribution of the brand ‘*Harwood’s*,’ a blended Canadian whiskey of 90.4 proof, distilled, blended and bottled by the said *Duncan Harwood & Co., Ltd.*, under the supervision of the Canadian Government; and

“Whereas, it is the intention of the parties hereto that the Supplier appoint the Agent as its exclusive sales and distributing agent for the sale of the said brand of ‘*Harwood’s*’ in the United States of America, subject to the terms and conditions of this agreement;

“Now, Therefore, in consideration of these presents, and for other good and valuable considerations, the parties hereto mutually covenant and agree as follows:”

It then recites its authority to sell *Harwood* whisky and its authority to enter into this contract

with R. C. Williams and that R. C. Williams will obtain the necessary permits and licenses and then obtain an order from the Price Administration setting [151] forth the maximum price for sales.

“The Supplier appoints the Agent as its exclusive agent to distribute the brand of blended Canadian Whiskey under the label of ‘Harwood’s’ for the territory comprising the United States of America, that is, the states in which the distribution and sale of alcoholic beverages is now and/or will in the future be permitted and licensed.”

It gives the price to be paid by the agent to the supplier for their Harwood’s Canadian whisky, \$19.05 a case, so many bottles per case and so on.

R. C. Williams & Company is to supply strip stamps.

“It is understood and agreed that title to all shipments from the Supplier to the Agent shall pass f.o.b. Vancouver, Canada, and the Agent assumes all risk of loss after the merchandise is loaded on railroad cars at Vancouver, B. C., and a railroad bill of lading is issued for such shipment.”

It provides for the putting on the bottles a label that the whisky is imported by R. C. Williams.

Then it provides for a 12½ per cent allocation of imports to New York City for retail sales by the agent.

“Notwithstanding the maximum prices set forth in the order of the Office of Price Ad-

ministration hereinbefore set forth, the Agent agrees that it will make sales of 'Harwood's' to wholesalers on the following basis:

"\$20.77, net, per case, f.o.b. Vancouver, Canada, in [152] bond, which price is made up of the total of

"(a) cost of \$19.05

"(b) strip stamps of 12', and

"(c) profit of \$1.60

and that all sales to wholesalers will be at a price not to exceed the said price of \$20.77 per case;"

Then it provides for the prices to retailers in New York City, and those are things in which we are not interested. It provides the agent shall put up a \$200,000 revolving, irrevocable letter of credit in favor of the supplier. It provides also that all notices shall be sent to supplier addressed to its address in Cuba and also a copy to H. H. Klein at 3610 Clarinrh Road, Baltimore, Maryland.

"All orders given pursuant to the terms of this agreement are accepted subject to the ability of the Supplier and the ability of its principal Duncan Harwood & Co., Ltd., to perform and should the Supplier or its principal be unable to complete the same by act of God, or the elements, public authority, public enemy, embargoes, obstruction to navigation, strikes,"

the elements, and so forth—they are excused. In

case of any dispute, it is to be disposed of by arbitration. This contract, by the way, was signed in New York City on April 18, 1944, by Vice President of R. C. Williams & Company and in Havana, Cuba, on the 8th of May, 1944.

Then here is a letter to this supplier addressed to it at [153] Havana, Cuba, dated April 20, 1944, which purports to be a supplement to this agreement. It is dated the 20th of April, 1944. This is addressed by Williams to the agency:

“Supplementing the agreement between us made the 18th day of April, 1944, and it being the desire of the parties that the merchandise be marketed through the proper channels and in the proper manner in order to establish the business on a sound financial basis, it is further agreed as follows:

“1. Out of the profit of \$1.60 per case as provided for in the agreement, the Agent agrees that it will pay a brokerage or selling commission of not in excess of 60c per case to brokers or selling agents selected by it but no such broker or selling agent will be selected by the Agent unless and until the written approval of the Supplier is first obtained as to each such broker or selling agent.

“2. The Agent will make no sales to wholesalers in monopoly states without first having received written approval of the Supplier. The Supplier shall have the refusal of the customer or the quantity sold by the Agent to any wholesaler or monopoly state.”

And then it contains some provisions relative to the quantities to be sold at retail in New York City, and then there is a provision relative to the letter of credit.

“5. All payments for merchandise are to be made in New York City.” [154]

That is the contract under which R. C. Williams operated, if the Court please, in connection with the sale of Harwood. I have no further witnesses at this time.

The Court: The plaintiff rests.

Mr. tum Suden: Yes, Your Honor.

Mr. Farraher: May I address the Court?

The Court: Yes.

Mr. Farraher: I now move, if Your Honor please, to dismiss this action, and my motion is made under Section 41(b) of the Rules of Civil Procedure, and without waiving any right to offer evidence in the event the motion is denied, upon the ground that under the facts and the law the plaintiff has shown no right to relief. In the first place, I would like to address myself to the two contracts that were introduced to show that the contracts exactly fit in with the representations made with reference to them in the letters that are in evidence from the Williams & Company and from the Importers Division, Mr. Ravaud. The first contract is an agency contract and it employs Williams & Company as agent. It provides that the price to be paid by the agent shall be a certain amount of money, \$19.05 a case, and it provides for how much

it can be sold by the agent, how much the whiskey can be sold for, and then it says, "it being the agreement of the parties hereto, the agent will make the profits herein set forth as and for such commissions, allowances, remunerations for its efforts and services." Title passes [155] f.o.b. the distillery, and as the evidence has shown here, all shipments to this territory came directly from the distillery to the wholesalers in this particular territory, which means that the goods would be cleared through the agent in New York, would be paid for there, would be shipped from the distillery and invoiced by Williams & Company. It provides that in the mark-up, as it has been called, the agent may make a profit of \$1.60, and that out of that profit, as shown by this other supplemental agreement, they agree to pay to brokers not to exceed 60 cents. If they paid the 60 cents they would make a profit of \$1.00, the profit that we have been discussing. That is a peculiar provision because ordinarily the agent can pay the broker anything he wanted to, if he wanted to cut down his profit, but this is a case where the distillery is controlling the situation, for the very obvious reason, I suppose, he wants to take care of his own wholesale customers and keep them. The agent will make no sales to wholesalers in monopoly states without first having the written approval of the supplier. The supplier shall have the refusal of the customer or the quantity sold by the agent to any wholesaler or monopoly state." Your Honor knows there are several monopoly states

where the State buys. So you have here the agent in New York bound as to customer by the distillery, so that that is why they had to clear through Koerner. That is why Koerner, after a case was made to Koerner as shown by these letters, he had to get approval [156] from the distillery before he could ship it, because the distiller is the one in the last analysis to determine where the stuff would go.

We have here, if Your Honor please, an agency where the goods went directly from the distillery, shipped direct to the customer, and the Williams & Company acted as the go-between in New York, as the agent, and got a markup commission of \$1.00 a case. All of those facts—not exactly the terms of these contracts—but the fact that they had to get the consent of the distillery to sell out here, the fact that Williams & Company did the invoicing, which would indicate, of course, the title was passing through them, and as the payments were through Williams & Company, the transactions here, the sales into this particular territory were handled in just that way. There is no misrepresentation at all in any of the letters or any of the evidence that is given here that conflicts with that. There has been no evidence to indicate at all that more than a dollar profit was earned by Williams & Company. The objection apparently that Mr. Fog has is that if instead of the contract providing for \$1.00 commission in the form of a markup, it just set the commissions, that then he would not be entitled to any-

thing, but because it was in the form of a markup, it ceased to be a commission and therefore they misrepresented it to him because they did not let him know that they owned the whisky, which they owned only during the period in which they got their letter [157] of credit and transmitted it to the distillery and the whisky was shipped.

The evidence is very clear that Mr. Fog all the time knew of this profit. He, of course, knew the method in which it was being handled because he participated to some degree in it and endeavored to participate to a greater degree in it.

That argument ran along, as the record shows, from 1944, the early fall of 1944, right down to the date of the settlement. They were arguing about it all the time. These letters are full of it. In some letters Fog said they did not know they were getting anything out of it. One letter says, "We are making nothing out of it." Your Honor recalls it was a letter by Ravaud. And Mr. Fog admits the division was making nothing out of it. Certainly when the head of the division is saying, "We are making nothing out of it," he is not talking about the parent Company. He is talking about "we," the division. But when Ackerman came in and wrote these letters he said, "We are not making anything out of this, and all that the Williams & Company, the parent company, is making, is \$1.00, they knew that at all times and even discussed it on that basis. He comes up first and is going to arbitrate the matter. There is no question about what the testimony

is. He wants part of that dollar. That is all. That is the dispute. He had legal advice. He tried to avoid that question of legal advice, but he had legal advice. As he said, he got impartial advice, and I am sure Mr. [158] tum Suden does not give that kind of advice. He said he got impartial advice, and he hoped they would do the same. So they could see the legal situation. He said in here they were shipping. Well, they were in effect shipping. But he says they were shipping prior to the time of the settlement. He was not fooled by anything in that. He said at one time Jaburg said, "We haven't anything to do with it." That is perfectly ridiculous, because the entire record from Mr. Jaburg and from everyone shows they were invoicing the stuff and making one dollar profit on it, but they were not handling it through this division. When it came to that assurance, it was given freely. It had been an oral assurance earlier, in 1943. There was a dispute over this question. If Mr. Jaburg wanted to be cute about it, he would say, "We recall no such thing. Back in 1943 an oral statement asking me to confirm that?" But when this dispute was right at its height he said, "Certainly, the assurance was made and I will give it to you." The assurance was made when two carloads of rum were shipped in. These facts were known. He had advice from counsel. And he goes into this settlement and he takes a figure suggested by himself, \$10,000, and then he tries to enlarge it a little, to get the balance of a \$15,000 loan that he had made that

was still due added to it. This was a settlement brought on by him in his claim for these commissions and a settlement with all the facts within his knowledge, and it was a settlement on the figures selected by him of \$10,000. [159]

There is testimony that that was a gift, but that testimony is not serious enough to be considered on a motion of this kind because he admits he executed two documents accepting the \$10,000 and taking a check which recited it was in settlement of the dispute between them. I submit, if Your Honor please, that they have made no showing here that would justify our putting on a defense.

This case, of course, is predicated on fraud in the making of that settlement, although Mr. Fog has said it was not really a settlement, it was a gift. Why in the world Williams & Company would be any gift, the company itself—the check came from Williams & Company—why they would do it I do not know. But he alleges a settlement and he asks the Court to set aside that settlement on the ground he would never have made the settlement if it had not been for misrepresentations. He says, “Plaintiff relying on the truthfulness of the false and untrue statements and representations so made to him by defendant regarding the sale and distribution of Harwood’s whisky accepted the offer of settlement so made to him, and defendant did thereupon pay to plaintiff the sum of \$10,000. Plaintiff would never have agreed to the settlement so offered by defendant nor would he have accepted the

sum of \$10,000 paid him by Williams in settlement of his claim for commissions on the sale of Harwood's whisky if he had not believed the representations made to him by defendant."

Here are the representations that are alleged: "That the [160] defendant corporation had nothing to do with the importation or sale." He has testified that right on the bottle it said it was imported. He said he did not know they had anything to do with that. He has developed this sale proposition a little further. This is the representation which he says was made, and there is no testimony that any such representation was made. Of course, the testimony shows he did know that it was handled because he knew it was invoiced by Williams. This is no stranger to the business; this is a man who makes invoices himself.

"Plaintiff never discovered that the statements and representations made to him by defendant to the effect that defendant corporation had nothing to do with the sale and distribution of Harwood's whisky in the said Western Division area, and that it had not demanded or received any commissions or compensations for sales of such whisky so imported and sold, were false and untrue until the latter part of the month of January, 1948." We showed that he knew at all times that the whisky was being handled by Koerner of Williams & Company. We showed at all times he knew they were getting \$1.00 a case. He has not established any false representations, and he certainly has not estab-

lished the allegations of the complaint where he alleges such representations were made to him, and that such representations were false.

I submit, if Your Honor please, the case should be dismissed [161] upon the ground that the evidence shows that the settlement was in fact made, that it was a settlement of an actual dispute, and that there was no misrepresentation or fraud inducing the settlement.

Mr. tum Suden: If the Court please, for the purpose of this motion, this is a motion for non-suit, I take it.

The Court: It is not a motion for a non-suit under the federal system, because the Court makes findings in determining a motion of this kind. It is a little different from the old procedure of the State Court.

Mr. tum Suden: However it is handled, the plaintiff in this action has established by his testimony and through correspondence that he was employed by R. C. Williams & Company, the Continental Import Division thereof; he was employed by its manager, Mr. Ravaud, to represent this division, which is nothing more nor less than a desk or R. C. Williams & Company, and I think Your Honor has made the observation that there is no distinction between the two, but he was employed and he was given a certain fixed salary together with a promise of an override or commission of so much a case on all liquor which would be handled or sent out into his territory which was assigned to him, either by

R. C. Williams or by Continental Imports. The commission is the main factor in his compensation. He was given that assurance and that assurance was confirmed by Mr. Ravaud or by Mr. Jaburg at the time he authorized Mr. Ravaud to write [162] that letter of September 13, 1945. The assurance was that any liquor sent out here by R. C. Williams into this territory, he would get his commission on it, just the same as any other commercial transaction where a representative is appointed—for instance, in the automobile line, if a territory is assigned to an agent out here and the manufacturer sells in this territory, the agent gets his commission. There is no distinction between the two. The question naturally came up to Mr. Fog when he saw Harwood's whisky bottles in his territory and naturally it aroused his curiosity, and the correspondence shows as soon as this appeared he made inquiry about it and he received replies which were disarming, if not deceitful. He received first the information that they were not handling it, they were simply clearing it for the distillery, and that they were not making any money on it, and that "we" in that letter that Mr. Farraher has referred to means R. C. Williams and not just the Import Division. But anyway, under the contract between Mr. Fog and R. C. Williams and the Import Division, it doesn't make any difference; if they shipped liquor out here, sold it out here, then he was entitled to his commission. The answer admits they sold it out here, and the contract that they had with the

distillery agencies in Cuba, which is not the distillery, but which is a selling agency, shows the transaction is a pure out-and-out commercial transaction. They bought this liquor, they imported it, and they were guaranteed a profit of \$1.60 a case after [163] deducting 12½ cents or 12 cents for strip stamps, and that contract is a plain agency contract for the selling of this liquor.

The Court: Probably that is the only way these fellows distributed their whisky to their clients in the United States.

Mr. tum Suden: Nevertheless, Williams took over title.

The Court: They did, but, of course, every act in their functioning was prescribed with particularity. They told them how much they had to pay, who they had to pay it to, who they had to sell it to, and they paid them for that service. It was a sale. There is no question about that.

Mr. tum Suden: It was an out-and-out sale, but they retained control, which is not unusual, and is really customary in contracts of this kind. They could refuse to sell if they did not have the supply, and they could refuse to recognize a customer if they wanted to.

The Court: What bothers me about this case is not any of those facts. I think your client might have done very much better for himself at the time he made this settlement with the defendants here if he had had you or some other good lawyer represent him instead of acting as his own lawyer, because

I think he probably may have succeeded in establishing a claim for some substantial amount. Irrespective of the technicalities involved, Williams & Company was shipping or causing to be shipped into his territory the merchandise, and not through the [164] Import Division, which was the assurance that was given to him when he took his job, and it may well be that he was entitled to a portion of this dollar that they made. I am not here to make new contracts for people who make improvident contracts.

Mr. tum Suden: That may be true, but the point is this, if Your Honor please: they gave him this assurance that if R. C. Williams shipped any merchandise out into this territory, that he would receive his commission on that particular shipment, and that is what they have done. The question that seems to bother you is the so-called question of settlement, the \$10,000.

The Court: That is the very thing your client was negotiating about. That is what he wanted. He said, "I am entitled to my commissions on this merchandise. You are not giving them to me. I want something done about that." He fussed around about that, thought about arbitration, and then instead of going to a lawyer—and some people never learn not to make that mistake—he acted on his own and he made a contract which may now appear to be somewhat improvident. He went in with his eyes open.

Mr. Farraher: As counsel said, he wanted to get

part of the dollar and he ended up by getting \$10,000 and another contract and he took that.

The Court: In my opinion, so far in this case there isn't the slightest bit of misrepresentation or fraud. Your client went after the very thing he wanted to get, and he ended up with less than what he could have gotten. That is all there is to it. [165]

Mr. tum Suden: My position on that is this: Every time Mr. Fog approached Mr. Jaburg, Mr. Ravaud or anybody in authority, he was assured by them that they were not selling it in his territory and they were not shipping it into his territory.

The Court: That is why I asked your client those questions. His case cannot rest on any such matter as that. The familiarities that surrounded the transaction between the defendants and the distillery do not determine the nature of the defendant's acts. I think the defendants did ship the merchandise into the territory.

Mr. tum Suden: Correct.

The Court: He knew it and he saw it with his own eyes, and he called it to the attention of these people, and then he tried to get them to pay a commission on that for having done that, and he ends up by settling the matter for \$10,000 and taking a new contract.

Mr. tum Suden: Over the period of time this matter went on they consistently told him they were not shipping it into here. They told him they were simply accommodating the distillery and they beat him down every time.

The Court: That is when he should have had

Mr. tum Suden or some other capable lawyer, and he wouldn't get beaten down.

Mr. tum Suden: Are they to be permitted to take advantage of that misrepresentation? They beat him down until he said, "I guess you are right. Maybe I am wrong." And then he explained [166] to Your Honor why the \$10,000 was given to him because the selling of this liquor, the shipping of this liquor into his territory prevented him from making further sales, influenced his relationship with his client, and they in the meantime were making a great deal of money in the retail trade.

The Court: He probably could have gotten more than \$10,000 if he asked for it.

Mr. tum Suden: I think he is entitled to it.

The Court: I am not intending to be facetious. Certainly the defendants did not pay the \$10,000 by way of a gift, just to be nice to him. They paid him the \$10,000 because they thought he had some kind of claim against them and they got off with that \$10,000.

Mr. Farraher: If I may refer to the deposition which was taken in New York, Mr. Ravaud testified it was given to Mr. Fog to take a bad taste out of his mouth.

Mr. tum Suden: I want to ask this question: Do you think that if Mr. Fog had definite information that they were shipping this into this territory, and that he was entitled to his 25 cents a case, which would have amounted to over \$100,000, do you think that he would have settled for \$10,000? It is not

logical and it does not make sense. If he knew that, as they claim he knew, he would not have been here today. He would have had a different situation.

The Court: I do not know what induced him to make the [167] settlement.

Mr. tum Suden: I know what induced him. It was their representations to him that he had nothing coming and they were not handling it and selling it.

The Court: Mr. tum Suden, your client has admitted on the witness stand, and the documents are distinct that he knew, the defendant was shipping this liquor into his territory. Now, he knew that. He can't take the witness stand in my court and look me in the eye and tell me, after he said that in writing, that he can by word of mouth wave that aside and say, "What I knew then I say now I did not know."

Mr. tum Suden: No, there is an explanation to that. It does not make any difference whether the invoices showed that Williams & Company were shipping into this territory. That was part of the procedure evidently arranged between Williams and the distillery in clearing the transaction. It is normal in such cases where there is a carload shipment or two carloads of shipment to be sent out into a territory for the wholesaler or the distributor to notify the manufacturer or the distiller to ship it direct to So-and-so and bill them for it, or ship it direct, they give the shipping orders and the invoices will show that the order came from R. C.

Williams to the distillery to ship some wholesaler in this territory and Williams bills the wholesaler for the amount of the shipment. That is in order to avoid extra transportation and extra storage. It doesn't mean [168] anything. It is not at all inconsistent with the so-called plan or explanation given Mr. Fog by R. C. Williams & Company. I maintain that those representations that they did not ship and they did not sell are the pertinent statements in this case and that he is entitled to his commission, because that put him off his guard. That was a misrepresentation as to the true situation. Why didn't they tell him the exact situation? They never did that. Continually, all the way through, they gave him an explanation that was not true. They kept it up until the time he signed the release. I maintain he is entitled to his commission. That is what the man took the position for, and if they can circumvent and avoid paying commissions by some sort of arrangement that they are only acting as agents or clearing it for a distiller, then none of these contracts mean anything, and any representative that relies upon his contract for a commission could be circumvented and his claim defeated, and I think that is what happened in this case. They did not have to have any salesmen. There weren't any salesmen. They simply had to take orders for Harwood whisky, and it was too bad in their imagination that they had to pay Mr. Fog anything at all on the sale which apparently they did not have to make. Nevertheless, that was

their agreement and he was entitled to his commission, and I do maintain that a case has been made out for the plaintiff in this action.

The Court: If I were trying the case as between the [169] plaintiff and the defendants as to whether or not he is entitled to commissions, the picture presented would be entirely different. At first blush, without hearing any other side of the case at all, it would appear there is a *prima facie* merit to the claim for commissions as far as Harwood is concerned. Of course, that is not the issue that is presented to me. The issue that is presented here is whether or not an agreement which the parties made should be set aside. The law favors the settlement of controversies by individuals, those who have controversies with one another. The law does not like to set those agreements aside. When it does, there has to be persuasive evidence of fraud or misrepresentation. It is not a thing that is likely to be contemplated.

Mr. tum Suden: I maintain if Mr. Fog had the benefit of counsel at the time, this thing was explained to him, it would be different, but he is an individual who does not understand the terms of these agreements and he is taken into their office——

The Court: Now, look. I am not particularly persuaded by the fact that he does not understand about it, because he made a very good advocate for himself on the witness stand. At every possible opportunity he argued his case to me, and

in this memorandum I notice that he referred to, C for Identification, he expresses himself fluently and explicitly, and in this paragraph that both of you have referred to, he says in language that is completely unequivocal, "Beginning in the early part of [170] 1944, the wholesale liquor division of R. C. Williams & Company, Inc., made direct shipments into my territory of Harwood's Canadian whisky 90.4 in absolute violation of their agreement with me." That is a categorical, explicit, affirmative statement. That has no qualifications to it at all.

Now, he said in answer to my question he thought that was the case. I could not believe that statement of a man of his obvious intelligence and experience. That is the statement of a man who knows what he is talking about. He is making a charge there. That is the charge he is making, and on the basis of that charge he wants a consideration shown him. That is why he is making that statement. It is obvious to me he did know. Of course, he knew Harwood liquor was being sold.

Mr. tum Suden: I do not not agree with that for the following reason: He prepared that document in contemplation of an argument with, say, an arbitration board and at the time he wrote that—and that is why we have that question of arbitration—he believed that Harwood whisky was being shipped in here. That was his belief. He had no proof of it but he believed it, and this was his argument. This was written for his own cause, to present his own cause. It was never sent to anybody. It was

his picture of the thing as he would present it. It does not follow that he knew, but that is what he was going to claim, and he drew that up.

Subsequent to that time when he met the parties here in the [171] Palace Hotel, after the document was written, they again told him the same story, that they were simply clearing it for the benefit of the distillery, that he had no commission coming, they were not selling it, they were not shipping it.

The Court: It was their contention that he was not entitled to a share of the commission on this Harwood transaction.

Mr. tum Suden: True.

The Court: A court passing upon that might decide that they were wrong, but that was their position, and maybe upon a full consideration of that matter, which we have not before us, it may be a court might decide in their favor. I do not know. All I have said is at first blush, having heard only one side of the case, it would appear that the plaintiff might have a pretty good case against them for these commissions. That is not on the basis of any difference between whether they were clearing it or whether it was an out-and-out transaction. It is on the basis that this commodity was caused to come into this market.

Mr. tum Suden: True.

The Court: And it doesn't make any difference as to the technicalities or means by which that was accomplished. That is the basis, that this man would have this claim against the defendants under

his agency contract. So therefore, there is no question of any misrepresentation as to the mode by which it is done, because the essence of his claim is not the means by which defendants caused the whisky to be introduced into this [172] market, the papers that they signed, the nature of their contract, but the fact that they caused the whisky to be introduced into this market that affects his position under his contract with them, and that fact he knew. There was no misrepresentation about that. Nobody concealed that from him. That is the claim he is asserting against him, that if this whisky was to be introduced into this market, it had to be through the concern with whom he had the contract, and that they had agreed with him that everything that came into this market would be through that import division, and therefore if they did bring whisky in, and they did bring it through the importing division, if the defendant did that, then by virtue of that fact, he was entitled to get a commission on that.

Mr. tum Suden: True.

The Court: That is the basis of his claim.

Mr. tum Suden: That is the basis of his claim, but they persuaded him out of it.

The Court: They persuaded him out of it by giving him \$10,000.

Mr. tum Suden: By giving him \$10,000 and by telling him he had no commission coming. They didn't handle it. They didn't sell it.

The Court: That sort of argument would ap-

ply in any case where a man made a settlement agreement and was convinced that he was talked out of it by his opponent. You go into your [173] settlements with a lawyer and you want \$10,000 and the other lawyer only wants to give you \$5,000, and you keep persuading him and finally you persuade him to give you \$10,000. He comes along later and wants to set aside that agreement, saying, "Tum Suden was too persuasive; he talked me out of that \$10,000 and I am going to set aside that document."

Mr. tum Suden: I would not be so persuasive in making such a settlement and rely upon misrepresentations and misstatements. I might persuade, I might argue, but I am not going to resort to falsehood, deception, and if I did such a thing that contract could be set aside, and that is what I claim here: they persuaded this man he had no commission coming. They told him they did not handle it or sell it. He did not discover the true nature of the transactions until he came in contact with the agent of the Internal Revenue.

The Court: I do not think the Internal Revenue agent gave him any other information. He already knew it was \$1.60. The only difference between what he learned from the agent and what he knew before, he said on the witness stand, was that the agent told him it was \$1.72.

Mr. tum Suden: Correct.

The Court: But he knew before it was \$1.60. He had that information already.

Mr. tum Suden: No, he never had that information. He did not have that information until we took the deposition in New [174] York and then they admitted it was \$1.60.

The Court: I saw a letter there in which a man told about having to pay 60 cents a case and they had to pay \$1.00.

Mr. tum Suden: They claimed they had to pay 60 cents per case. They didn't say on \$1.60.

The Court: They said they had to pay 60 cents out and they made a dollar. The only difference between what the man knew before and what he knew later, the agent down there told him it was \$1.72.

Mr. tum Suden: And that they were selling at a marked up price. They were not getting a commission for handling it. I submit the contract should be set aside.

The Court: I do not blame you for bringing this suit. I will say that to you because maybe you might have got some further benefit out of the matter. But I cannot see in the record the slightest evidence of any misrepresentation or fraud of any kind that is sufficient in law to set aside an agreement that the parties have made.

Mr. tum Suden: Except that they got his signature by telling him something that was not true. That is the whole basis.

The Court: Maybe they told him something that was not true, but it has to be of material significance.

Mr. tum Suden: It is the basis of the whole

claim. If they were selling it, he is entitled to his commission.

The Court: I couldn't find in my conscience to set aside any [175] agreement on such a technicality as he makes on the witness stand, that he would be entitled to his commission for \$1.60 calculated under one plan or another plan. I do not see any warrant for doing that. The damage to him arises not by virtue of the manner in which the contract was made between the distiller and the supplier; the damage arises because of the introduction and the disposition and the distribution of the liquor in his territory. That is what causes him his damage.

Mr. tum Suden: True.

The Court: And that he knew about.

Mr. tum Suden: And when he asked for his commission on it, they told him, "We are not selling it. Our agreement is if we sell it. But we are not selling it. We are just accommodating the distillery. We are making a misrepresentation." There is a fundamental misrepresentation there. It is not true, and he did not find out the true situation until January, 1948, and it was on the basis of that statement of theirs that they convinced him that they were not selling it or that they were not shipping it into this territory in accordance with the agreement, and he said, "I will have to believe you. I guess that is right."

The Court: Mr. tum Suden, I wish I could decide this case more favorably to you because I think your client was probably entitled to more than he got. But I can't remake the contract. This matter

should have been litigated in the first instance. This litigation is a nice afterthought and if you could succeed [176] in getting something for your client out of this litigation because of the settlement unfavorable to him that was made in the first instance, I see no objection, but I can only decide the precise matter that is before me. My sympathies are more or less in favor of the plaintiff in this case, despite the fact that in my opinion he did not make a good witness. But I can't find any evidence in the case of a lawful character that would warrant me setting aside this transaction on the ground of fraud or misrepresentation. The evidence does not meet up to that stature, in my opinion.

Mr. tum Suden: Of course, I can't argue with Your Honor and I do not want to prolong this. I simply maintain they did misrepresent the situation to him and got his signature on the basis of that misrepresentation, and therefore the agreement should be set aside.

The Court: For the reasons I have stated, I hold that the motion for dismissal is good, and it may be granted upon findings to be prepared and served in accordance with the ruling. [177]
[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing and ac-

companying documents and exhibits listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant:

Complaint for Cancellation of Agreement on Ground of Fraud and for Money Due.

Answer to Complaint.

Deposition of Hugo F. Jaburg and Jean Ravaud.

Deposition of Ove Fog.

Findings of Fact and Conclusions of Law.

Judgment.

Motion for New Trial and Notice of Motion for New Trial.

Order Denying Motion for New Trial.

Notice of Appeal to Circuit Court of Appeals Under Rule 73 (b).

Appellant's Designation of Contents of Record on Appeal.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

Defendant's Exhibits Nos. A, B, & C.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of May, A.D. 1949.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ E. VAN BUREN,
Deputy Clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 12242

OVE FOG,

Plaintiff and Appellant,

vs.

R. C. WILLIAMS & CO., INC., a Corporation,
Defendant and Appellee.

STATEMENT OF POINTS RELIED ON AS
GROUND FOR APPEAL

The Statement of Points relied upon as grounds for appeal is as follows:

At the conclusion of plaintiff's case, defendant made a motion for dismissal under Rule 41(6) of the Rules of Civil Procedure for the United States District Courts on the ground that plaintiff had shown no right to relief. The trial court granted the motion and directed findings.

It is appellant's contention that the court erred in granting said motion in that plaintiff in said action had clearly shown a right to relief and that the findings of fact and conclusions of law are not supported by the evidence.

Dated this 27th day of May, 1949.

/s/ RICHARD TUM SUDEN,
Attorney for Appellant.

Receipt of Copy of above is admitted this 27th day of May, 1949.

SULLIVAN, ROCHE,
JOHNSON & GANAKE.
/s/ JULES JACOBS,
Attorney for Appellee.

[Endorsed]: Filed May 27, 1949.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now Ove Fog, plaintiff and appellant herein, and designates the following as the Record on Appeal in the above-entitled matter:

1. Complaint, filed herein on the 11th day of June, 1948.
2. Answer of defendant, filed herein on the 27th day of July, 1948.
3. Order for Judgment, filed herein on December 29, 1948.
4. Findings of Fact and Conclusions of Law filed herein December 28, 1948.

5. Notice of Entry of Judgment filed herein January 21, 1949.

6. Motion for New Trial, filed herein January 31, 1949.

7. Order denying motion for new trial, filed herein March 24, 1949.

8. Notice of Appeal, filed herein on April 23, 1949.

9. Deposition of Hugo Jaburg and Jean Ravaud taken on November 15, 1948.

10. Reporter's Transcript of Testimony taken in the above-entitled matter on December 28th and 29th, 1948, together with all exhibits offered or introduced in evidence during the taking of said testimony.

This Designation of Record on Appeal dated May 27th, 1949.

/s/ RICHARD TUM SUDEN,
Attorney for Plaintiff and
Appellant.

Receipt of Copy of above Designation of Record on Appeal is hereby admitted this 27th day of May, 1949.

SULLIVAN, ROCHE,
JOHNSON & GAMAKEN.

/s/ JULES JACOBS,
Attorneys for Defendant and
Appellee.

[Endorsed]: Docketed and Filed May 27, 1949.

[Endorsed]: No. 12242. United States Court of Appeals for the Ninth Circuit. Ove Fog, Appellant, vs. R. C. Williams & Co., Inc., a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 18, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 12,242

IN THE

United States Court of Appeals
For the Ninth Circuit

OVE FOG,

Appellant,

VS.

R. C. WILLIAMS & Co., INC.,
a corporation,

Appellee.

BRIEF FOR APPELLANT.

TUM SUDEN AND TUM SUDEN,
605 Market Street, San Francisco 5, California,
Attorneys for Appellant.

FILED

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PAUL P. O'BRIEN,

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No. 12,242

IN THE
United States Court of Appeals
For the Ninth Circuit

OVE FOG,

Appellant,

vs.

R. C. WILLIAMS & Co., INC.,
a corporation,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL FACTS.

The action was brought in the United States District Court because of diversity of citizenship, the plaintiff being a resident of the City and County of San Francisco, State of California, and the defendant being a resident of the City of New York, State of New York, the amount in dispute being in excess of \$3000.00.

The complaint was filed in the United States District Court on June 8, 1948. (R. 2-9.)

The Findings of Fact were filed in the United States District Court on January 14, 1949 (R. 21-31), and the

Judgment entered in the Civil Docket January 20, 1949. (R. 32.)

A Motion for New Trial and Notice of Motion for a New Trial were filed in the United States District Court on January 31, 1949 (R. 33 and 34); the order denying the Motion for a New Trial was filed March 23, 1949. (R. 35.)

The Notice of Appeal to the Circuit Court of Appeals under Rule 73(b) of the United States Code of Civil Procedure was filed on April 22, 1949. (R. 35.)

The appeal was taken within thirty days after the giving and filing of the Notice of the entry of order denying plaintiff's Motion for a New Trial.

Jurisdiction is conferred upon the Honorable Court to review the final judgment of the District Court of the United States by Section 128 of the Judicial Code, as amended (Title 28 USC 1921) wherein it is proved that:

“The Court of Appeals shall have jurisdiction of appeals from all final decisions of the District Court of the United States * * * except where a direct review may be had to the Supreme Court.”

SPECIFICATIONS OF ERROR.

At the conclusion of plaintiff's case defendant's counsel presented a Motion to Dismiss the action under Section 41 (b) of the Rules of Civil Procedure for the United States District Court upon the ground that plaintiff under the facts and law had shown no

grounds for relief. (R. 287.) The Judge of the District Court granted said motion and directed the preparation of findings. The court further denied plaintiff's motion for a new trial.

In granting said motion to dismiss and in denying said motion for a new trial the court did so on the ground that the evidence showed:

1. That no fraud was practiced upon plaintiff by defendant corporation or any of its officers and no misrepresentations were made by them to him to induce him to enter into the settlement. (Findings X, R. 29), and on the ground—

2. That plaintiff at all times knew all the facts concerning the importation and sale of Harwood Whiskey within his territory. (Finding VIII, R. 28.)

Appellant specifies said findings to be erroneous as not supported by the evidence.

It will be urged by appellee that all inferences and intendments should be indulged in in support of the judgment. We will show, however, that misrepresentations were made up to the very moment of settlement and that under no circumstance could it be inferred that Mr. Fog could have known that the Williams Company was not importing Harwood Whiskey from the distillery at Vancouver but from the Agencias Distiladores of Cuba. Most certainly he could not have known facts and circumstances under which the whiskey was purchased and imported from the Cuban corporation.

STATEMENT OF THE CASE.

This appeal is taken from the judgment of the United States District Court rendered in granting defendant's motion to dismiss the action made under Section 41 (b) of the Rules of Civil Procedure at the conclusion of plaintiff's case. Said motion was made on the asserted ground that under the facts and the law the plaintiff had shown no right to relief. (R. 287.)

The action is one to set aside a purported settlement of the claim of plaintiff against defendant on the ground that the said settlement was obtained through misrepresentation and fraud and further for an accounting.

It is appellant's contention that the trial court erred in granting the motion in that the law and evidence fully supports and substantiates the cause of plaintiff.

THE FACTS.

The defendant, R. C. Williams & Co., Inc., is a New York corporation engaged in the business of importing and merchandising wines, spirits and liquors as exclusive sales agent which merchandise was sold by defendant throughout the several states and territories of the United States. It is a large concern doing an annual business of from \$15,000,000 to \$25,000,000 in its liquor division alone. It transacted its liquor business, aside from its wholesale business in the Metropolitan area of New York, under the designation of "Continental Import Division of R. C.

Williams & Co., Inc.” and later through “Williams Importers, a Division of R. C. Williams & Co., Inc.” These divisions were not separate entities or corporations but merely departments or “desks” of R. C. Williams & Co., Inc.

In May, 1942, plaintiff, Ove Fog, was approached by one Jean Ravaud, the representative of R. C. Williams & Co., Inc., and after negotiations was appointed manager by defendant of the western branch of the liquor division of defendant corporation for the sale and distribution of the various wines, spirits and imported liquors handled and dealt in by defendant corporation. The territory assigned to plaintiff comprised the states of California, Nevada, Arizona, Washington, Oregon, Utah, Idaho, Montana, Wyoming, New Mexico and the territories of Hawaii and Alaska. Plaintiff's compensation as manager for said western division was agreed to be on the basis of a minimum fee plus an all around commission on all wines, spirits and liquors sold and delivered by defendant throughout the area computed as follows: 10 cents per case for the first 5000 cases; 15 cents per case for 5000 to 10,000 cases; 20 cents per case for 10,000 to 15,000 cases and 25 cents per case for all over 15,000 cases. (R. 91.) Other than this their agreement was not in writing but was recognized as a “gentlemen's agreement”. (R. 86.)

At the conferences in San Francisco between Mr. Fog and Mr. Ravaud relating to Mr. Fog's appointment, it was represented to him and he was assured that the liquor division of R. C. Williams & Co., Inc.,

was large and growing and that additional lines of liquors were to be acquired and by reason thereof Mr. Fog's compensation would be greatly enhanced. He was further assured that all merchandise shipped into his territory by R. C. Williams & Co., Inc., would be through his department.

At the time of Mr. Fog's appointment R. C. Williams & Co., Inc., did not then have the representation or handle the importation of Harwood's Whiskey, a Canadian product. It acquired the exclusive sales rights for the United States in May, 1944. (Exhibit 20, R. 270.)

In the latter part of 1944 Mr. Fog discovered that bottles of Harwood Whiskey were appearing on the shelves of distributors in his territory marked as "Imported by R. C. Williams and Co. Inc." None of these sales were handled through Mr. Fog's branch office but were made direct by R. C. Williams & Co. Inc., as importer and he received no commissions thereon nor was any accounting rendered him relative to the sales of Harwood Whiskey in his territory.

Upon the appearance of Harwood Whiskey in his territory Mr. Fog made inquiry of Mr. Ravaud by telephone and letters for an explanation and requesting his commissions, reminding him that he had been assured that all such shipments would be made through his office.

There were numerous letters, telephone conversations and meetings regarding the subject with which we will deal in detail in our argument. In all of these,

representations were made in an effort to explain and satisfy Mr. Fog that he was not entitled to commissions. Ultimately Mr. Fog was called to New York for a conference regarding the subject of his commission claim. At this meeting, at which were present Mr. Hugo Jaburg, President of R. C. Williams, Jean Ravaud, General Manager of the Import Division. The suggestion was made that the matter be arbitrated (R. 151). At the same time, September 13, 1945, Mr. Fog was given written assurance that no merchandise would be shipped into his territory by R. C. Williams & Co., except through his office. This assurance was in the form of a letter confirming a verbal conversation made in December, 1943, to this effect. (Plaintiff's Exhibit No. 14, R. 150.)

The proposed arbitration never took place. Then in February, 1946, the gentlemen again met at the Palace Hotel in San Francisco, and the matter further discussed in a series of meetings. At these meetings Mr. Fog was again assured that nothing could be done about his commissions, that he was not entitled to any commissions, and reasons were advanced. The final outcome was that Mr. Fog because of his trust and confidence in them and their intimate personal relations was convinced by the representations made to him that he was not entitled to commissions. (R. 155.) Mr. Jaburg as a gesture of good will and in order to send him back to the coast in a right frame of mind (R. 67) agreed that Mr. Fog be given \$10,000 and that an agreement be drawn up to avoid further misunderstandings, again assuring him that he would be

protected against R. C. Williams & Co., shipping merchandise into his territory. (R. 168.) Under date of March 8, 1946, Mr. Fog received correspondence relative to the proposed settlement. (R. 171; Plaintiff's Exhibit 17.) These agreements omitted the essential provision for protection to Mr. Fog against shipments by R. C. Williams & Co. into his territory, and he wrote back (R. 180) in protest enclosing a draft of the terms as he understood them. (R. 182.)

Mr. Fog was next called to New York for a further conference and the question of his protection was discussed and after assurance that he was already protected (R. 189, 193) he signed the agreement in their original form and was given the \$10,000.

Subsequently, in April, 1947, Mr. Fog was requested to submit his resignation (R. 194), which he did.

On January 28, 1948, Mr. Fog was subpoenaed by the Bureau of Internal Revenue to produce correspondence relative to the sale of Harwood Whiskey. During the course of his examination by a Mr. Gaines of the Bureau of Internal Revenue Mr. Fog for the first time learned that R. C. Williams & Co. actually were buying Harwood Whiskey at one price, marking it up and selling at another, contrary to the representations made to him that they as agents were merely clearing the merchandise as a service to the Canadian Distillery. (R. 100; 196-197.)

Important as bearing on the matter of discovery is the fact that neither Mr. Fog nor his counsel learned that R. C. Williams & Co. was in fact importing Har-

wood Whiskey, not from the Canadian Distillery but had the exclusive sales agency from a Cuban corporation, the Agencias Distiladores S. A. This fact was not revealed until shortly before the trial when the contract was produced. (R. 270.)

ARGUMENT ON THE GRANTING OF THE MOTION TO DISMISS.

The essence of this case is the granting of the motion to dismiss. The court recognized that plaintiff had a valid claim for commissions (R. 298, 305) because defendant was shipping Harwood Whiskey into Mr. Fog's territory, and that therefore under his contract he was entitled to get his commissions (R. 305.) However it denied him relief on the ground that he knew that fact when he accepted the \$10,000. Of this the court said (R. 304):

“The Court. And it doesn't make any difference as to the technicalities or means by which that was accomplished. That is the basis, that this man would have this claim against the defendants under his agency contract. So therefore, there is no question of any misrepresentation as to the mode by which it was done, because the essence of his claim is not the means by which defendant caused the whiskey to be introduced into this market, the papers that they signed, the nature of their contract, but the fact that they caused the whiskey to be introduced into this market that affects his position under his contract with them, and that fact he knew. *There was no misrepresentation about that. Nobody concealed that from*

him. That is the claim he is asserting against him that if this whiskey was to be introduced into this market, it had to be through the concern with whom he had the contract, and that they had agreed with him that everything that came into this market would be through that import division, and therefore if they did bring whiskey in, and they did bring it through the importing division, if the defendant did that, then by virtue of that fact, he was entitled to get a commission on that''.

From that statement, which is the basis of its decision, it is evident the court labored under a misconception of the issues. That statement of the court that "there was no misrepresentation about that. Nobody concealed that from him", is entirely incorrect and erroneous. True, Mr. Fog knew that Harwood Whiskey was shipped into his territory and that it bore the label "R. C. Williams & Co. Importers", but when Mr. Fog demanded his commissions defendants explained that though their name appeared on the bottles they were only acting on behalf of the distillery; they denied his right to commissions and used every artifice and device to deceive him and convince him that his claim for commissions was without foundation. Consistently pursuing their course throughout their negotiations, defendants did succeed in perpetrating a fraud upon plaintiff and did induce him in reliance upon their representations in accepting the sum of \$10,000.00, not in settlement of his claim but "to take a bitter taste out of his mouth". (R. 67.)

THE MISREPRESENTATIONS.

When Mr. Fog learned that Harwood Whiskey was being shipped into his territory with R. C. Williams & Co., label as importer, he made inquiry by telephone and letter. (R. 94; Plaintiff's Exhibit 4, R. 96.) He received a reply from a Mr. Ackerman, Assistant Manager for Continental Imports Division of R. C. Williams & Co., under date of October 20, 1944. (Plaintiff's Exhibit 5; R. 101.) In this letter Mr. Ackerman states:

"Several of our distributors have written to us about Harwood Canadian Whiskey, as R. C. Williams' name appears on the bottle as the sole United States distributor importer.

"Actually our company has had nothing to do with the sales representation of this item. All sales were made by representatives of the distillery, and at their terms. As a service to the Canadian distillery R. C. Williams & Co., Inc., 265 Tenth Avenue, New York City, merely cleared all United States sales for them, and served as a wholesaler in New York City for this product."

He also received a reply from Mr. Ravaud under date of October 21, 1944 (Plaintiff's Exhibit 6, R. 104):

"I have received your memorandum of October 18th regarding the question of the Canadian Whiskey distributed by R. C. Williams, and no doubt you have received a letter of explanation from Mr. Ackerman on the subject.

"I would like to confirm, however, that we had a long meeting with Mr. Jaburg, Mr. Koerner and George Ackerman and myself after the reception of the telegram and letter from Oscar. By telephone I explained the situation to you which is as follows:

R. C. Williams wholesale department have the exclusive franchise of this whiskey in New York, provided they accommodate the Canadian Distillers by clearing the merchandise for them and do the billing in the United States. This is exactly what has happened, for as a matter of fact, Koerner has nothing to do with the sales which are made by the representatives of the UDL Distillers in Vancouver. * * * As you know, we are not making any money at all on the Canadian Whiskey and outside of a moral obligation, I have been glad to obtain the merchandise for Parrott & Co., having in mind they will use this whiskey to push our other items."

Under date of October 27, 1944, Mr. Fog received another letter from Mr. Ackerman reiterating the fact that "they have nothing to do with setting of the terms any more than we had anything to do with the sale of the whiskey". (R. 108.)

Early in the trial the court interrupted to make certain it understood the issues in the case. (R. 113.)

"The Court. Then the defendant contends it did not make any sales at all.

Mr. Farraher. That is right. It made no direct sales.

The Court. That is what I mean, that it made no sales, that *it was getting paid for the service*

it rendered in distributing, billing and distributing.

Mr. Farraher. That is right.

The Court. That it actually made no sales at all?

Mr. Farraher. That is right.

The Court. Your position is there were no sales made.

Mr. Farraher. That is right.

The Court. It makes no difference whether that is the Import Division or the R. C. Williams & Company."

Again at page 114:

"The Court. I am commencing to see what the issues are.

Mr. tum Suden. Our position is, if the Court please, that they did import this Harwood Whiskey, and under their contract with Mr. Fog they shipped it into this territory regardless of how the sales were made.

The Court. Your position is, irrespective of whatever the arrangement was, the plaintiff being the sole representative of the defendant here on this coast, is entitled to so much per case for all this whiskey that was handled irrespective of the method of handling it by the defendant. That is your position.

Mr. tum Suden. That is right, yes. They had an agreement that they would ship nothing in here except through his division and they imported it at one price and sold it at another.

The Court. All right. Now defendant says that that dispute did exist and we settled it. We paid them \$10,000. And your position is that that

dispute was settled, it is true, but it was settled on the basis of some representation which you subsequently discovered was not correct.

Mr. tum Suden. That is right.

The Court. We understand each other now as to what dispute it was that was settled or attempted to be settled."

The above is declaration of issues, the defendant asserting again and again that Williams made no sales whatsoever. The above statement and admissions by defendant's counsel is in direct conflict with the finding of the court that Mr. Fog knew at all times Williams was mailing sales.

Next we refer to plaintiff's Exhibit 8, R. 117, being a letter from Mr. Geo. M. Ackerman under date of December 19, 1944. In this letter Mr. Ackerman states that he has Mr. Fog's letter to Mr. Ravaud dated December 15, 1944, and in which he states that Mr. Irving Koerner is definitely in charge of shipments from the *distillery*.

Then on February 2, 1945, Mr. Fog wrote Mr. Ravaud (Plaintiff's Exhibit 9, R. 119) reasserting his claim for commissions and protesting the shipment of Harwood Whiskey into his territory. This letter clearly reveals that Mr. Fog was ignorant of the method of operation of R. C. Williams & Co., in handling the whiskey. In this letter he states that he was given the impression that there was no profit in such transactions and and that it was a matter of courtesy to cooperate. He reminds Mr. Ravaud of the agreement that R. C. Williams & Co. would not oper-

ate directly in his territory except through his department.

Under date of February 6, 1945, Mr. Fog received a letter from Mr. Ackerman in response to Mr. Fog's letter of February 2nd to Mr. Ravaud. In this letter Mr. Ackerman reported a meeting of R. C. Williams & Co.'s executives in regard to Harwood Whiskey shipments into Mr. Fog's territory. The important part is as follows:

"It is true that other agents hired by UDL are paid by R. C. Williams, as that is the law as long as our name appears on the bottles. However this money originally comes from UDL."

"No matter what the outcome is, please forget about your commissions arguments on this whiskey. It is definitely impossible, and it is weakening my position, etc." (Plaintiff's Exhibit 11, R. 125.)

Under date of February 12, 1945, Mr. Fog wrote a long letter to Mr. Ravaud reviewing their correspondence and fully explaining his position in regard to the dispute over his commissions. (Plaintiff's Exhibit 12, R. 137.) This letter was a review of the former correspondence and expressed his inability to understand the various explanations given him why he is not entitled to his commissions. He comments on the fact that he was given to understand that this business was handled without profit and yet he is also informed that R. C. Williams does not make more than one dollar per case. This letter was not answered by Mr. Ravaud until March 5, 1945, by letter in which

Mr. Ravaud refers to the matter as the "Harwood Whiskey Mystery". (R. 145.) He does not deny the justness of Mr. Fog's claim for commission or take issue with him on any statement but evades the subject by the assertion that Mr. Fog is not working for R. C. Williams & Co. but for Williams Importers. Nevertheless he promises a solution which however never materialized.

In addition to the documentary letters Mr. Fog testified that there were numerous meetings, conversations, telegrams and telephone calls at which the subject was discussed.

When the meetings were held with Mr. Ravaud relative to his employment he was assured that all merchandise sold by R. C. Williams would be through his office. (R. 79.) This testimony is verified by the testimony of Mr. Ravaud given on the taking of his deposition (R. 59 and 60) as well as by letter (R. 86; Exhibit 14, R. 150.)

Mr. Fog testified that there were many conversations. (R. 147.) In one instance Mr. Ravaud stated that he could do nothing about the Harwood situation because it was not handled by R. C. Williams, it was invoiced but that was on behalf of the distillery.

Again he relates the conversations at the meeting in September, 1945, in New York. He discussed the matter with Mr. Jaburg who denied his right to a commission with the explanation "that it was a different deal". (R. 148.) He testified that at the meeting in March, 1946, at the Palace Hotel Mr. Jaburg

again informed him that he had no valid claim to commissions. (R. 154.) Mr. Jaburg confirms the fact of these late conversations and that he told Mr. Fog that there was nothing they could do about his commissions. (R. 50 and 51.) Mr. Jaburg testified that the orders for Harwood Whiskey were placed by brokers appointed by the distiller. (R. 47 and 48.)

Thus it will be seen that various reasons were advanced by defendant for avoiding the payment of commissions to Mr. Fog. There is no testimony or evidence that the true situation was revealed to him. Both Mr. Jaburg and Mr. Ravaud on the taking of the deposition, which testimony was referred to in the motion for a new trial, in substance testified and admitted that upon the final meetings in New York and at the Palace Hotel that such conversations were held and that they denied Mr. Fog's right to commissions.

It will be recalled that counsel for defendant, in response to the court's inquiry, stated that it was a fact "that R. C. Williams & Co. did not make any sales at all." (R. 113.)

It will be further recalled that under the "gentlemen's agreement" it was agreed that Mr. Fog would be paid commissions on all items shipped into his territory by R. C. Williams directly or through its Williams Importers Division. (See Plaintiff's Exhibit 14, R. 150.)

Early in their relations R. C. Williams did ship directly several carloads of Puerto Rico rum into Mr. Fog's territory, and upon reminder of the agreement

assured Mr. Fog it would not make such direct shipments in the future. (R. 93.) Mr. Ravaud, in his deposition confirms this incident. (R. 60.)

When reminded of this situation and of this agreement at the meeting in New York in September, 1945, between Mr. Jaburg, Mr. Ravaud and Mr. Fog, Mr. Jaburg admitted it but flatly told Mr. Fog "Oh yes but that is a different deal, we don't sell it". (R. 148.) At that same conference Mr. Ravaud told Mr. Fog that they couldn't do anything about Harwood because it was not handled by them or by R. C. Williams; "it was invoiced, but that was on behalf of the distillery." (R. 147.)

In other words, the picture of the situation painted for Mr. Fog throughout the entire history of this dispute and up to the very moment of the alleged "settlement" was that R. C. Williams did not sell Harwood but only handled it as a matter of accommodation for the distillery. That all sales were made by distributors for the distillery and R. C. Williams merely did the clearing and billing, for which it received a compensation of \$1.50 a case (R. 54) out of which R. C. Williams had to pay the brokers for the distillery their commissions. That they netted not more than \$1.00 per case. His right to commissions is independent of R. C. Williams' profit. He was informed that this agreement was by contract between R. C. Williams and UDL (the distillery in Vancouver) in consideration for the privilege of wholesaling Harwood in the New York Metropolitan area.

The explanation given by Mr. Jaburg on the taking of his deposition is as follows:

“Harwood Whiskey was handled by R. C. Williams on an entirely different basis than in our Import Division. While we acted as a distributor for the brand in the United States at the insistence of the distillery, it was not included in our regular import division due to the fact that this distiller had certain distributors of his own through whom he had sold other products and he insisted upon having these distributors handle Harwood as a different item and he also insisted on appointing his own sales force who acted as brokers and received a brokerage on the sale of this whiskey”. (R. 47.)

The facts were entirely different. R. C. Williams had no contract with the distillery. Harwood Whiskey was purchased and imported by R. C. Williams from the Agencias Distiladores SA, a Cuban corporation. This corporation had the sales agency for Harwood Whiskey and it entered into a contract for exclusive sales in the United States with R. C. Williams under date of April 18, 1944. This was subsequent to Mr. Fog's employment by R. C. Williams. Under this contract Agencias Distiladores appointed R. C. Williams the exclusive sales agent and distributing agent for the sale of “Harwood's” in the United States of America. Under this contract R. C. Williams was to pay \$19.05 per case and was to sell the whiskey in the United States at \$20.77 per case at a profit of \$1.60. Article Seventh of the contract provided that title to all shipments was to pass f.o.b. Vancouver, Canada,

and R. C. Williams assumed all risk of loss after the merchandise was loaded on railroad cars at Vancouver and bill of lading issued. (See Plaintiff's Exhibit 20, R. 270.) These provisions establish the fact that R. C. Williams was not the agent for the distillery but had the exclusive sales rights in the United States for its own account.

This contract did not come to light until shortly before the trial and neither plaintiff nor his counsel knew the terms thereof prior to that time. It is thus clear, beyond dispute, that the explanations given Mr. Fog were false and untrue and the entire situation was repeatedly misrepresented to him. R. C. Williams & Co. had the exclusive sales rights and imported and sold Harwood just as it did any other brand and upon which it was obligated to and did pay Mr. Fog commissions.

But the trial court, in granting the motion to dismiss did so on the ground that Mr. Fog was fully informed on all the facts. Its reasoning appears to be that because Harwood appeared in Mr. Fog's territory with the label of R. C. Williams as importer that he must perforce have known all the circumstances, terms and conditions under which Harwood was imported. The court stressed the fact that Mr. Fog accused R. C. Williams of shipping into his territory in a statement prepared for the suggested arbitration. This statement was prepared as a statement of his case. It was never used. The statement was prepared quite some time prior to the subsequent nego-

tiations which led to the settlement. In the intervening period defendants continued their representations and in furtherance thereof gave him the written guarantee of September 13, 1945.

The giving of this guarantee more than anything else convinced Mr. Fog that Williams & Co. was not selling Harwood for their own account. It was inconceivable to him as it would be to anyone else that such a guarantee would be given by Mr. Jaburg if in fact Williams did sell Harwood. This act on Mr. Jaburg's part convinced him that Mr. Jaburg was telling the truth, ultimately convinced Mr. Fog that he was not entitled to commissions. They were his superior officers and pretended to be his friends. He was entitled to and did trust and believe in them. He had no other sources of information. In the final stages they reassured him R. C. Williams was not selling or shipping into his territory. "That it was a different deal." They assured him that if the Williams Co. did so ship or sell he would get his commissions. To further influence him, they agreed to give him the \$10,000.00, not in payment on account of commissions but as a gesture of good will. (R. 67.) That gesture itself was an act of misrepresentation as well and calculated to influence and convince Mr. Fog of the truth of their representations that he was not entitled to commissions.

AS TO MR. FOG'S KNOWLEDGE.

The question of Mr. Fog's knowledge is inextricably interwoven with the evidence of misrepresentation. All of these misrepresentations were calculated to convince Mr. Fog that he was not entitled to commissions. It never once appeared in the record that the true situation was explained or revealed to Mr. Fog. On the contrary the evidence proves that the defendant used every means, subtle and direct, to prevent his knowing the true facts. How then in the face of this situation can the court infer that nevertheless Mr. Fog actually knew all the material facts of the transaction? It must be obvious that if Mr. Fog knew the facts, knew that his claim for commissions was sound and that he was entitled to over \$100,000.00 that he would have accepted the \$10,000.00 in "settlement" thereof.

The evidence conclusively proves that Mr. Fog could not have known the true facts. How could he have known that Williams & Co. was not transacting business with the Distillery in Canada but was purchasing and importing the whiskey from Agencias Distiladores from Cuba? He could not have known the terms and provisions of their contracts. The accusation made in his argument for arbitration was only a statement of what he hoped to establish. It was not proof that he knew or had actual knowledge of all the real facts.

"It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual

knowledge on his part. * * * The court will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded."

Victor Oil Co. v. Drum, 194 Cal. 226, 241;

Simmons v. Briggs, 69 Cal. App. 447, 464.

We contend this case comes squarely within the principles quoted in *West v. Great Western Power Co.*, 36 Cal. App. (2d) 403, 414:

"Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on or being misled by it, *must be clearly and conclusively established by the evidence.*" (Emphasis ours.)

Mr. Fog did not discover the fact that Williams Co. actually imported the whiskey for their own account until he was subpoenaed by the Bureau of Internal Revenue on January 28, 1948. (R. 195-197.) Even then he did not know all the facts. It was not until his counsel shortly before trial learned that Williams & Co.'s contractual relations were not with the Distillery but were with a Cuban corporation, the *Agencias Distiladores*.

CONCLUSION OF ARGUMENT.

We submit that the trial court's findings that plaintiff knew all the facts concerning the importation of Harwood Whiskey and that no deception was prac-

ticed upon him by defendant are erroneous and are not supported by the evidence. The decision was made at the conclusion of plaintiff's case. The defendant presented no evidence. The evidence is all one way, documentary and oral. The trial court could only arrive at its decision by the resort to inference, conclusions or surmises, which are not warranted or supported by the evidence. The evidence for plaintiff was clearly, amply and firmly established by an unbroken line of evidence. There was no real or substantial conflicting evidence. Standing alone the admissions of defendant's officers that at the time of settlement plaintiff was informed that no commissions could be paid him, as it was a different deal together with the last minute production of the Agencias Distiladores contract conclusively establish that plaintiff could not have known the real facts concerning the sale of Harwood Whiskey. Certainly it cannot be said that plaintiff's knowledge of the real facts, which shall prevent his recovery in this case, was clearly and conclusively established by the evidence.

We respectfully submit that the judgment herein should be reversed.

Dated, San Francisco, California,
September 7, 1949.

TUM SUDEN AND TUM SUDEN,
Attorneys for Appellant.

No. 12,242

IN THE

United States Court of Appeals
For the Ninth Circuit

OVE FOG,

Appellant,

VS.

R. C. WILLIAMS & Co., INC.,
(a corporation),

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

INTRODUCTION.

This case involves no complicated issues of law. The only evidence is the testimony of plaintiff and the documents offered in evidence by both parties on the examination of plaintiff as a witness.

There was a dispute between the parties hereto as to whether plaintiff was entitled to receive commissions on sales of Harwood whiskey, which was engaged in for over two years and very persistently and firmly by plaintiff as will hereinafter appear. That dispute ended in a settlement in which plaintiff asked for and received \$10,000—in compromise of his claim. That settlement was made on *March 8, 1946*. This action was filed June 11, 1948 (R. 9).

Plaintiff seeks to set aside the settlement on the ground that he was induced to enter into it, by misrepresentations of defendant's officers; and that he did not know that the representations were false, until shortly prior to the filing of this action.

The rule as to cases of this character is set out in some detail in *Oppenheimer v. Clunie*, 142 Cal. 313, 314 and 315. The rule there expressed requires that a Court shall not set aside a contract made, except upon "clear and decisive proof." This case does not require the application of that rule because the evidence shows that plaintiff not only was not misled on a material issue, but was not misled at all.

**Correction of False Impression in
Appellant's Brief.**

Since appellant in his opening brief sought to create the impression that defendant corporation R. C. Williams & Co., Inc. and its subsidiary, for which plaintiff worked, are one and the same (on the top of page 5 of the brief, appellant's counsel refer to the subsidiary as a "desk" of R. C. Williams & Co.), it might be well, at the outset, to set up the relationship as it appears on the record.

Defendant R. C. Williams & Co., the parent concern, has, and during all of the times involved had, its place of business at 265 Tenth Avenue, New York City (R. 116). Its president was at all times herein mentioned Hugo F. Jaburg.

The wholesale liquor division of defendant corporation carried on its business at the office of the company

at 265 Tenth Avenue (R. 116), and Irving Koerner was its manager (R. 116).

Maintaining independent offices, at 610 Fifth Avenue, many blocks from the offices of the defendant corporation (the parent company which as above stated were situated at 265 Tenth Avenue) was a division of defendant corporation which changed its title twice. It was originated as Continental Import Division (R. 96) and wound up as "*Williams Importers*". Jean Ravaud was its general manager (R. 86), and Geo. M. Ackerman, Assistant Manager (R. 99). This was the division which hired plaintiff Fog, and in November, 1942, gave him the percentage deal under which he worked (Plaintiff's Ex. 3, R. 91).

This distinction is important only because appellant in his brief seeks to make the two departments one, so that, when he charges either his senior officer, Ravaud, who is writing about Continental Import or Williams Importers, and is not an officer or manager of the business of defendant corporation which it carries on under its own name on Tenth Avenue, or Ravaud's assistant Ackerman with making statements beginning with the pronoun "we", this Court will consider he was talking about defendant corporation, when as a matter of fact his remarks are as to his own division. For example, on page 12 of plaintiff's brief in this appeal, we find plaintiff's counsel referring to two letters, one of October 21, 1944, from Ravaud to plaintiff (Plaintiff's Ex. 6, R. 104), and the other of October 27, 1944, from Ackerman to Plaintiff (R. 108). In each of those letters the writer uses the

pronoun "we", and is very obviously referring to the import division, which was plaintiff's employer, and not to defendant corporation.

Appellant admitted from the witness stand that, until the dispute over Harwood whiskey arose, he never did any business of any kind with the parent company (R. 204).

**Depositions in Record Are Not
Properly a Part Thereof.**

Since the cause was decided on the termination of plaintiff's case, the only evidence on the record is that introduced by plaintiff. There is in the printed "Transcript of Record" the deposition of Hugo F. Jaburg, President of defendant corporation, and Jean Ravaud, head of the branch of defendant corporation, by which plaintiff was employed. These were placed on the printed record at the instance of plaintiff, but are in fact no part of the true record on this appeal, as they were never offered in evidence by either party. However, appellant's counsel has seen fit to make use of them in his argument. (See appellant's brief, pp. 17, 19.)

THE ORDER OF ARGUMENT IN THIS BRIEF.

Ordinarily one can look to the complaint of plaintiff to determine what his cause of action is and the ultimate facts which he hopes to prove to entitle him to judgment.

If plaintiff is held to his pleading, his case is hopeless because he was forced to admit from the witness

stand (as we shall later show) that every material allegation in the complaint as to fraud is false.

Confronted with a lack of proof, he switched to a different theory, namely, that while he knew defendant corporation was the importer and distributor of Harwood in the United States and in this territory, and was making a dollar a case profit thereon, he did not know that its written contract was with the distiller's agent instead of with the distillery direct, and he didn't know that its compensation was through a \$1.00 per case mark up of the goods, rather than a \$1.00 per case commission, and that these facts were withheld from him.

We shall, therefore, first present the set up of the dispute and the settlement, and then discuss (1) the lack of any evidence to sustain plaintiff's cause as pleaded, and (2) the lack of evidence to support the claim as he sought to develop it at the trial.

HOW THE DISPUTE AROSE.

On his direct examination plaintiff testified as to his original contract with *Continental Import Division* of defendant corporation. It was oral and was with Mr. Jean Ravaud, the general manager of the division. He testified he was to receive a guarantee of \$4,200.00 a year, and Ravaud was to work up a schedule (to quote plaintiff)

“for the commission I was to receive for whatever business I did in my territory which, of course,

was the most important part of the income I was looking forward to receiving.” (R. 83.)

In November, 1942, plaintiff received from Mr. Ravaud the schedule of commissions which varied from 10 cents a case up to 5,000 cases, to 25 cents a case for all over 15,000 cases (Plaintiff’s Ex. 3, R. 91.)

In July, 1943, R. C. Williams & Co. shipped some two carloads of rum into plaintiff’s territory, without sending it through plaintiff’s office (R. 92). Plaintiff protested and Mr. Ravaud promised to take it up with Mr. Jaburg, President of the defendant corporation, and later reported back to plaintiff that Mr. Jaburg said it was a mistake, and that it wouldn’t happen again and that no merchandise would be shipped into this territory except through plaintiff’s office (R. 94). That was a gratuitous action on Jaburg’s part, since as plaintiff testified his contract only involved the “business *he did* in his territory” (R. 83).

Plaintiff did well on his job with the Import Division. He quit a job at Schenley’s where his salary was \$400 or \$500 (R. 242), plus a bonus at the end of the year which he never received because he didn’t remain on the job that long (R. 242). He went to work for Continental Import Division for a guarantee of \$350 and commissions. In 1943 and 1944, the least he earned was \$21,000 (R. 243).

By 1944 the whiskey shortage was getting serious. We don’t know whether it would be proper for us to suggest that the condition was so general that the Court might take judicial notice thereof. At any rate,

the demand for whiskey was so great (as plaintiff testified on cross-examination) that:

“Everybody wanted whiskey and couldn’t get it. If you had whiskey, you could make them take a lot of other things along with it.” (R. 240).

In other words, if plaintiff’s division could sell whiskey, they could force the wholesaler to take a lot of items such as wines, foreign rums and the like *in return for the privilege of being permitted to purchase whiskey*.

In fact, plaintiff on cross-examination complained that he lost sales of carloads of merchandise because he couldn’t supply Harwood whiskey (R. 240).

Plaintiff admitted that Jaburg advised him that he was trying to induce the distillers to handle Harwood through plaintiff’s division and that he (plaintiff) has no reason to doubt that information.

Plaintiff also admitted that he never heard any insinuation even that defendant corporation had any salesmen in plaintiff’s territory selling Harwood (R. 227).

Defendant’s Contracts With Distillery Agent.

When the situation was thus, defendant corporation made a contract with the distiller’s agent involving Harwood whiskey. The first contract is dated April 18, 1944, and it is in evidence as plaintiff’s Ex. 20 (R. 270 et seq.). The contract was between defendant corporation and Agencias Distiladores, exclusive agent of the distillery which makes Harwood (R. 271), and,

after providing for sales by defendant corporation to its retailers in New York City, it fixes a sales price to wholesalers, outside of New York City of \$20.77 F.O.B., Vancouver, made up of the following items:

- (a) Cost of \$19.05
- (b) Script stamps of 12 cents, and
- (c) Profit of \$1.60 (R. 275),

and it provides that the profit of \$1.60 a case shall take the place of "commissions, allowances or remuneration for its efforts and services" (R. 273).

Defendant corporation then made a separate and supplemental agreement with the distillery's agent which took from defendant corporation 60 cents of the \$1.60 profit. The contract is dated April 20, 1944. While it is dated 2 days later than the first contract (Plaintiff's Ex. 20), it is without doubt all a part of an identical transaction. It will be observed that the signing of the first contract by the Distillery Agent was on May 8th. (R. 280.)

Under this supplemental agreement, defendant corporation was required to pay a

"brokerage or selling commission of not in excess of 60 cents a case to brokers or selling agents selected by it, but no such broker or selling agent will be selected by the agent *unless and until the written approval of the supplier is first obtained as to such broker or selling agent.*"

That is what Mr. Ackerman was talking about in his memo of October 20, 1944, to Fog (Plaintiff's Ex. 7), when he said that:

“Actually our company has nothing to do with the sales representations of this item. All sales were made by the representatives of the distillery and at their terms.” (Plaintiff’s Ex. 5, R. 102.)

Plaintiff Wanted Defendant to Pay Double.

With no sales resistance; with defendant corporation compelled under their Harwood contract to pay commissions to the distiller’s agents, although defendant assumed the burden of importation and invoicing; with no sales burden on the Division which employed plaintiff, it is no wonder that defendant corporation did not consider itself bound to pay an additional commission to plaintiff; and, by the same token, it is not surprising that plaintiff wanted a commission, without any work of any kind to be done by him.

The correspondence in the record shows that plaintiff very persistently and forcefully pleaded his cause to the officers of his Division and of defendant, the parent company.

PLAINTIFF’S PLEADED CASE AND FAILURE OF EVIDENCE TO SUPPORT IT.

Appellant pleads a dispute. In paragraph VIII of appellant’s complaint (R. 4 and 5) he alleges:

“For a period of more than one year prior to March 8, 1946, a controversy pended between plaintiff and defendant corporation over the question of the payments of commissions to plaintiff, * * * for Harwood’s whiskey imported and

sold by defendant corporation in the western division assigned to plaintiff."

He also pleads a compromise settlement. He alleges that the dispute was compromised and settled on March 8, 1946, by the payment to plaintiff of \$10,000.00, and by plaintiff's signing of a release (which is in evidence as part of plaintiff's Exhibit 17, and will be found on pages 172 to 173 of the Record). Plaintiff pleads the settlement in the following language:

"On or about *March 8th, 1946*, defendant corporation * * * offered to pay plaintiff the sum of \$10,000.00 in full settlement of plaintiff's claim that he was entitled to commissions * * * on the sales of Harwood's whiskey sold and delivered by or through defendant corporation in said Western Division area.

and finally that

"Plaintiff * * * accepted the offer of settlement so made him and defendant did thereupon pay to plaintiff the sum of \$10,000.00."

Of course, in the absence of fraud on the part of defendant corporation or mistake, that settlement disposed of the controversy.

However, plaintiff seeks by this action to set aside the settlement on the ground that it was procured by certain misrepresentations on the part of officers of the defendant corporation.

According to *the complaint*, plaintiff's ground for asking the trial court to set aside the said settlement was that:

(1) "Defendant corporation falsely and fraudulently and for the purpose of deceiving and misleading plaintiff represented and maintained that defendant corporation *had nothing to do with the importation or sale of said Harwoods whiskey in said Western Division area.*" (Complaint par. VIII, R. 5.)

(2) Defendant corporation also "made repeated statements * * * that defendant * * * was not receiving any compensation for the sale of such whiskey in said area."

and that

"Plaintiff would never have agreed to the settlement so offered by defendant nor would he have accepted the sum of \$10,000.00 paid him by way of settlement of his claim for commissions on the sale of Harwood's whiskey, if he had not believed the representations made to him by defendant *that defendant corporation had nothing to do with the sale and distribution of Harwood's whiskey in said Western Division.*" (Complaint Par. IX; R. 6.)

Plaintiff follows these allegations of fraudulent misrepresentation with a plea of late discovery, charging that he

"never discovered that the statements and representations made to him by defendant to the effect that defendant corporation had nothing to do with the sale and distribution of Harwood's whiskey in the said Western Division, and that it had not demanded or received *any commissions or compensation* for sales of such whiskey so imported and sold, were false and untrue until the

month of January, 1948''. (Complaint Par. XI, R. 6 and 7.)

If we accept appellant's pleading as the groundwork of his claim, and if the evidence shows that plaintiff at the time of the settlement knew that defendant corporation had had *something to do* with the "importation or sale of said Harwood's whiskey", and knew defendant corporation was receiving commissions or compensation for sales of such whiskey," then the settlement determined appellant's cause.

Did Appellant Know Before March 8, 1946, That Defendant Had Something to Do With the Importation or Sale of Harwood Whiskey?

At the trial, appellant testified on direct examination that, in the fall of 1944, he learned from a local wholesaler that Harwood was available in this territory and Williams & Co. (defendant) was the importer. (R. 94-95.)

On October 18, 1944, plaintiff wrote Ravaud that he had just learned that defendant corporation had confirmed by telephone the sale of 4 carloads of the whiskey to Abrams Co. (R. 97, Plaintiff's Ex. 4.)

On October 20, 1944, Ackerman wrote plaintiff enclosing a form letter for Plaintiff to send to customers, "giving you the terms and conditions of the sale of Harwood Whiskey". (Plaintiff's Ex. 5, R. 101.) In the same letter, Ackerman says that the distributor

had agreed to "honor our recommendations in accordance with their ability to deliver." (R. 102.)

On October 21, 1944, Ravaud wrote plaintiff that defendant corporation "has exclusive" for New York City provided it accommodate the Canadian Distilleries by clearing the merchandise for them and doing the billing in the U.S. (Plaintiff's Ex. 6, R. 106.) In the same letter he gives plaintiff right to sell some Harwood to Bohemian Distributing Co. (R. 106.)

On December 12, 1944, Ackerman wrote plaintiff that he had "learned that Irving Koerner is definitely in charge of shipments from the distillery", and he suggests that any of defendant's good customers who want any information about Harwood whiskey should contact Koerner (R. 117) and says that he understands that the "distillery only ships after getting O.K. from Mr. Koerner". (R. 117.)

On February 2, 1945, plaintiff writes Fog that he has accidentally discovered that "R. C. Williams & Co. were sending an additional 4 cars of Harwood's whiskey to Los Angeles." He further says that he knows that Parrott & Co. did not use previous shipment of Harwood for "good distribution of Williams Importers, different items." (R. 120.)

In the same letter (Plaintiff's Ex. 9), plaintiff comments on the fact that the bottles are marked "Imported by R. C. Williams & Co." (R. 121-122.)

On February 3, 1945, Ravaud by letter (Plaintiff's Ex. 10) informs plaintiff that Koerner had confirmed

4 cars for February to Parrott & Co., and assures plaintiff that "we will see that" Sierra gets a car. (R. 123-124.)

In his letter of February 6, 1945, Ackerman advises plaintiff, with reference to plaintiff's request that Sierra Wine & Liquor Co. be sold some Harwood, stating that Koerner "will be glad to accept their order", but it must be on same terms as sales to Parrott, viz. letter of credit, etc. (Plaintiff's Ex. 11, R. 128.)

Heretofore we have discussed only the information plaintiff received from correspondence which he offered in evidence on direct. We now come to his cross examination.

He admitted he knew as early as 1944 that, if any customer of his wanted any Harwood whiskey, it had to come through R. C. Williams & Co. (R. 198-199.)

He knew in 1944 and 1945 that "any of the whiskey that came into this community cleared through Mr. Koerner", and that Ackerman had told him that Koerner was the man to see in connection with the purchase of Harwood whiskey. (Plaintiff's Ex. 8, R. 117 and 208.) He knew *that* a year before the settlement.

In a meeting in New York in September, 1945, Jaburg suggested the dispute be submitted to arbitration, so some time later plaintiff prepared a statement for submission to an Arbitration Board, made, of course, before the settlement, which he headed

“To whom it may concern”. (Plaintiff’s Ex. C, R. 253, et seq.) In that statement he said:

“Beginning in the autumn of 1944, the wholesale liquor division of R. C. Williams & Co., Inc. made direct shipments into my territory of Harwood’s Canadian whiskey, an absolute violation of their agreement with me”. (R. 254.)

Of course, neither plaintiff nor his able counsel can reconcile the above testimony with the essential allegation of the complaint that plaintiff believed that defendant corporation had “nothing to do with the importation or sale of said Harwood’s whiskey in said Western Division area.” (R. 5.)

**Did Plaintiff Before March 8, 1946,
Believe That Defendant Corporation
Was Not Receiving Any Compensation
For the Sale of Such Whiskey
in Said Area?**

Plaintiff pleads that he was induced to settle because defendant “falsely and fraudulently * * * denied that it had demanded or received any commissions on sales of such whiskey so imported and sold in said area.” (Complaint, Par. VIII, R. 5.)

Plaintiff on *page 12* of his brief quotes the following from a letter dated October 21, 1944, sent him by Mr. Ravaud:

“As you know, we are not making any money at all on the Canadian whiskey, and outside of a moral obligation, I have been glad to obtain the merchandise for Parrott & Co. having in mind they will use the whiskey to push our other items.” (Plaintiff’s Ex. 6, R. 105-108.)

On his cross-examination, plaintiff testified that his claim that he was told by Williams & Co. that it was not making any money on Harwood was based upon that letter. And, in his brief, he follows that, with reference to a similar letter of Mr. Ackerman to him, which is dated October 27, 1944, in which Mr. Ackerman wrote that "We (inadvertently plaintiff's counsel substituted 'they') have nothing to do with the settling of the terms, any more than we had anything to do with the sale of the whiskey." (R. 109.)

Plaintiff's counsel interprets the "we" in each of those letters as referring to R. C. Williams & Co., the defendant corporation. Of course, plaintiff himself knew better. Messrs. Ravaud and Ackerman were respectively manager and assistant manager of the business conducted at 610 Fifth Avenue, under the name and style of "Continental Import Division of R. C. Williams & Co.", and later as "Williams Importers" (R. 161, 173, 177 and 180). When they used the personal pronoun with reference to their business, they were referring to their own business not the business carried on by R. C. Williams & Co. over on Tenth Avenue.

Even had plaintiff been misled by the use of the word "we" in those letters, he was soon disillusioned, for on February 6, 1945, Mr. Ackerman wrote plaintiff (Plaintiff's Ex. 11, R. 127-128), discussed the entire Harwood situation with him, related his efforts to get R. C. Williams & Co. to give plaintiff's division distribution of Harwood in this territory, and said that

he had even expressed to defendant corporation a willingness to make no commission charge, so that the division could push their other merchandise by including some whiskey, which all wholesalers were trying to get. And finally he commented that:

“R. C. Williams & Co. and any or all of its divisions *do not make more than \$1.00 per case on all of the Harwood that is sold*, except on that amount which is wholesaled here in New York City.”

Plaintiff didn't overlook that statement in Mr. Ackerman's letter, because we find him on February 13, 1945, in answering Ackerman's letter, quoting from it the reference to the \$1.00 per case profit. He then calculates the per carload profit at \$1,650, and objects to the refusal to pay him his commission saying:

“Your office seems to ignore the fact that our company is making \$1650 net profit for each car sold, and in the same breath I am asked as a good fellow to give up my right to a commission on deals transacted on this item in my territory, which in my opinion is overshooting a little” (R. 134).

And later on in the letter, plaintiff says:

“In this case, R. C. Williams is making some good money on Harwood whiskey. The only trouble appears to be that, after that profit is made, the fight is on as to who is going to have what” (R. 136).

In the following month Mr. Ravaud wrote plaintiff (Plaintiff's Ex. 13, R. 141 et seq.):

"It is true R. C. Williams is making \$1.00 a case gross profit, but even if it sounds paradoxical, it is not Williams Importers, and you are working for Williams Importers. As a matter of fact, I am working for Williams Importers and I have nothing to do with the sales of R. C. Williams" (R. 145).

On cross-examination he admitted, perforce, that he learned from the February 6th letter (Plaintiff's Ex. 11) that defendant corporation was making a dollar a case on Harwood whiskey distribution (R. 204-5). And that was over a year prior to the settlement. And he also admitted on cross-examination that he doesn't know *now* whether Williams and Co. were making any more than \$1.00 (R. 205) which is significant because plaintiff was the only witness in the case.

The Parties Dealt at Arm's Length in the Negotiations.

In his memo to Mr. Ravaud of February 2, 1945 (Plaintiff's Ex. 12, R. 131) plaintiff complained that he was entitled to commissions on Harwood sales, saying:

"It seems logical to me that I am entitled to commissions even if Williams Wholesale Division does not want to take advantage of my services but prefer to handle sales through outside channels" (R. 121).

and he winds up his letter:

“If you are of the opinion nothing will be done, would you kindly inform me and I shall consider this intolerable situation of Harwood’s whiskey closed” (R. 121).

And on February 13, 1945, he wrote Mr. Ravaud:

“I have a working agreement with you on a commission basis which would entitle me in this instance to 25 cents per case on all Harwood whiskey already shipped or coming into this territory, and I am at loss to see where any sound reason has been advanced for changing this agreement beyond the thought that I would be a good fellow to do so” (Plaintiff’s Ex. 12, R. 134-5).

In September, 1945, plaintiff went to New York, and, in a conference with Mr. Jaburg, he asked Jaburg why he wasn’t entitled to a commission on Harwood whiskey, and Jaburg replied “because *Williams Importers* didn’t handle it” (R. 148). Plaintiff then brought up the matter of a “gentlemen’s agreement” to the effect that defendant corporation would not ship any merchandise into this territory except through plaintiff’s division (R. 148).

Jaburg Demonstrated His Fairness in Negotiation.

This so-called “gentlemen’s agreement” grew out of the following circumstances—in 1943 defendant corporation shipped a couple of carloads of imported rum into the western territory. Plaintiff learned about it and complained because it did not come

through his office (R. 93). Ravaud took the matter up with Jaburg, and Jaburg gave assurance that such would not happen again (R. 94). There is nothing in the record to show that it was other than an ordinary sale in which defendant corporation would not be obliged to make commissions thereon to other than its own salesman.

When plaintiff reminded Jaburg of this in the September, 1945 meeting he asked Jaburg if he would confirm the statement in writing. Jaburg said "Oh, yes, but *that was a different deal*. We don't sell it" (R. 148). And *it was a different deal*, unless on the rum shipment defendant corporation had to pay the salesman's commissions to others than its own salesmen, and plaintiff offered no evidence that such was the case. There is nothing to show that at the time of the rum shipment there was no need to sell rum, or that it sold itself, or that the manufacturer insisted on its salesmen being paid by the distributor, etc.

However, in a fine gesture of fairness, and despite the fact that he denied the justice of plaintiff's claim, Jaburg on September 13, 1945, furnished plaintiff with a letter confirming that "in a conversation held in December, 1943" * * * he gave plaintiff his verbal assurance that no merchandise would be shipped into plaintiff's territory by defendant corporation "except through Continental Import Division, now Williams Importers" (Pltf's. Ex. 14, R. 150).

Plaintiff Decides on Arbitration and Prepares a Statement.

Following that Jaburg recommended arbitration, and plaintiff asked for time to consult his attorney. He decided on arbitration which was delayed by the absence of Jaburg and Ravaud in Europe. He prepared Exhibit "C" (R. 253), as a statement of his case to be presented to the Arbitration Board.

He Quotes His Attorney's Opinion and Talks About a Law Suit.

As late as February 15, 1946, plaintiff wrote Jaburg, stating that "to remove any remaining doubts" in his mind, he had put his case before his attorney, and he quotes his attorney as favoring Court action.

THE MAKING OF THE SETTLEMENT.

Then followed the final conferences with Jaburg, which were held around February 25, 1946 (R. 154). Plaintiff, in relating the conversation, credited Jaburg with again saying that plaintiff had no valid claim for commissions on Harwood, and he says that, in reply, he (plaintiff) suggested a friendly civil suit (R. 154-5), and the talk wound up with plaintiff being left to decide for himself whether it would be a law suit or arbitration or a forgetting of his claim. He testified: "It was for me to make up my mind and I had to leave an answer" (R. 155). He then returned to Jaburg saying (according to his testimony on direct) that "from his (Jaburg's) assurance to me, I understand I have no commission in Har-

wood," and he asked for \$10,000 to make a tax payment, on the ground that he suffered in his trade in not having Harwood whiskey with which to entice customers to buy other merchandise he was selling (R. 155).

After some consideration, Jaburg agreed to pay the \$10,000 (Plaintiff's testimony R. 155, R. 170-173), and Ravaud sent plaintiff the settlement letter and release form dated March 8, 1946, which is in evidence as Plaintiff's Ex. 17 (R. 171 et seq.). Plaintiff tried to get its terms changed by submitting a counter proposition and trying to raise the settlement payment by \$3,200, the amount which plaintiff owed defendant corporation for moneys theretofore loaned him (Plaintiff's Ex. 18, R. 180-181; 182-183). Defendant corporation remained adamant, and plaintiff signed the full release, which will be found on pages 172 and 173 of the record, and the new contract, which is set out on pages 173-175.

It is significant that in the settlement letter (Plaintiff's Ex. 18) Ravaud writes:

"Having previously advised you that *Williams Importers* has nothing to do with this product."

He does not say defendant corporation had nothing to do with Harwood whiskey, but that the division which plaintiff worked for, viz., *Williams Importers*, had nothing to do with it; which, of course, was the ground of plaintiff's complaints at all times.

**PLAINTIFF'S EFFORT TO AVOID THE SETTLEMENT AND
HIS CLAIMED NEWLY DISCOVERED EVIDENCE.**

Plaintiff's counsel is too able to realize that plaintiff's testimony reveals such a thorough knowledge of the method in which Harwood's whiskey was handled in this territory, as far as defendant corporation's connection therewith, which is fatal to plaintiff's recovery in this action.

However, plaintiff, in his evasive testimony, gave his counsel an idea, which he develops on pages 19 to 23 of his brief. This new theory is that, even though at the time of the settlement, plaintiff knew that the Harwood whiskey was coming into this territory, believed defendant corporation was shipping it into this territory, and knew that defendant corporation was importing it and invoicing the sales to wholesalers, and was thereby making \$1.00 a case for their services, and knew that if any of the customers wanted Harwood they should contact Koerner, nevertheless the settlement should be set aside because defendant's representatives withheld from plaintiff the fact that defendant's contract was with an agent of the distiller instead of with the distiller direct, and that the \$1.00 a case was reached by a mark up in price instead of by way of a percentage commission.

The Claimed False Representations.

On page 18 of appellant's brief, his counsel gives the statements which he contends constitute the inducing false representations. They are:

(1) "R. C. Williams did not sell Harwood but only handled it as a matter of accommodation for the distillery."

(2) "All sales were made by distributors for the distillery and R. C. Williams merely did the clearing and billing for which it received \$1.50 a case out of which R. C. Williams had to pay the brokers for the distillery their commissions."

(3) "They netted not more than \$1.00 per case."

(4) "The agreement was by contract with U.D.L.(the distillery in Vancouver) in consideration for the privilege of wholesaling Harwood in the N. Y. Metropolitan area."

There Was No False Representation.

Nowhere in the Record is there the slightest evidence establishing the falsity of any of the foregoing representations.

(1) On October 20th, 1944, one year and four months prior to the settlement, Geo. Ackerman of Continental Import Division of defendant corporation sent plaintiff a copy of a form letter he was sending out to distributors, and he offered to send the letter to any of the distributors in plaintiff's territory. The form letter said in part:

"Several of our distributors have written to us about Harwood Canadian whiskey, as R. C. Williams' name appears on the bottle as *the sole U.S. distributor importer*" (R. 101-102). "Actually

our company has nothing to do with sales representation of this item. All sales were made by representatives of the distillery, and at their terms.” (R. 102).

“As a service to the Canadian Distillery, R. C. Williams & Co., 265 Tenth Avenue, New York City, merely clear all U. S. sales for them and serve as a wholesaler in New York City for this product.” (R. 102).

The letter then goes on to say that, in several instances, Williams & Co. were embarrassed in not being able to take care of their customers, and then says:

“We explained this to the distillery. Therefore, they have agreed *to honor our recommendations in accordance with their ability to deliver*, and still in accordance with their terms.” (R. 102).

Then is given the terms. And the letter closes with the statement

“Please advise us of your interest one way or the other. Please also keep in mind that, as we do not control the sales of this item, we cannot guarantee exclusive representation to you.” (R. 103).

In addition to the foregoing is the fact that later plaintiff was advised, in writing, by Ackerman of Williams Importers that Koerner was “definitely in charge of shipments for the distillery”, and therefore he was the man to contact (Plaintiff’s Ex. 8, R. 115).

On page 19 of his brief, plaintiff quotes from Mr. Jaburg’s deposition (which was never offered in evidence, and therefore is not before the trial Court), a

statement entirely consistent with Ackerman's letter of October 20, 1944 (*supra*), and adds that the item was not included in "our regular import division" (in which plaintiff was employed), because the "distiller had certain distributors of his own * * * and insisted on appointing his own sales force who acted as brokers and received a brokerage on the sale of this whiskey" (Plaintiff's Brief, p. 19).

We have already called attention to the letter written by Ackerman to plaintiff as far back as February 6, 1945 (a year before the settlement) in which he mentions that defendant corporation was making \$1.00 a case profit (Plaintiff's Ex. 11, R. 127).

A Distinction Without a Difference.

Now what are the facts discovered by plaintiff after the settlement?—merely the exact terms of the contract between defendant corporation and the distillery's agent (Plaintiff's Ex. 20, R. 270-282) namely: (1) That defendant's contract was with an agent of the distillery, and (2) the profit to defendant was in the form of a "mark up".

Let us consider these two points briefly:

(1) The contract is with Agencies Distiladores, S.A. The contract recites "Agencias Distiladores" is the "exclusive agent of Duncan Harwood Co., the distiller, for the entire world", and refers to the Harwood Company as its "principal" (R. 271, 277 and 278). As such agent it made the deal with defendant corporation, and provided for all deliveries to be F.O.B. distillery at Vancouver (R. 273).

Where is there any subterfuge here? What difference is there between an agent making a contract for a principal and the principal making one for himself? And how could any distribution between the two be material to the situation of plaintiff when he made his settlement and got the \$10,000 that he was in need of?

(2) A reading of the contract between defendant corporation and the agent for the distillery confirms all that Ackerman said in his letter of October 20, 1944 (*supra*). The contract provides that defendant's compensation in lieu of commissions and all other compensation shall be \$1.60 per case (R. 275). The "supplemental" contract between the same parties, required defendant corporation to pay a commission of 60 cents per case to brokers or selling agents "selected by it, but no such broker or selling agent will be selected by agent (defendant corporation) unless and until the written approval of the supplier (the distillery's agent) is first obtained as to each such broker or selling agent." (R. 281). And to clinch the matter, the contract provides that the "supplier shall have the refusal of the customer or the quantity sold by the agent to any wholesaler." (R. 281).

No language in that contract is inconsistent with the representation that defendant corporation was merely doing the clearing and billing for the distillery, which plaintiff says is a misrepresentation. Plaintiff offered no evidence to show that defendant corporation was not paying the 60 cent commission to salesmen selected by the distillery. It offered no evidence that defendant did any more with the Harwood sales than is re-

lated in the letters written to him by Ravaud and Ackerman as heretofore related. Plaintiff admitted that he never ascertained that any salesmen of defendant corporation was selling Harwood in his territory and never even heard any insinuation that there was (R. 227). He knew the whiskey was shipped directly from the distillery to his territory (R. 227 and 264).

In his statement prepared to submit to the Arbitration Board, plaintiff said:

“Beginning in the autumn of 1944, the wholesale liquor division of R. C. Williams & Co. made direct shipments into my territories of Harwood’s whiskey in direct violation of their agreement with me.” (R. 253-254).

His statement was based on information secured from defendant corporation and from fact that it invoiced the goods (R. 235).

On recross toward the close of his testimony, plaintiff, in endeavoring to explain the difference between his knowledge of the deal of defendant corporation with the distillery’s agent, prior to the settlement, and the knowledge he acquired afterwards, said:

“They had never used the word, they never told me at no time, that they had sold the merchandise, just like they sold it in Metropolitan New York” (R. 263).

Of course, they didn’t sell it like they did in New York, for, as the contract with the distillery’s agent shows, the deal with reference to New York City was entirely different than the deal elsewhere in the U.S.

Outside the City of New York, not only did the Distillery agent require payment of commissions up to 60 cents a case to be paid to salesmen approved by it, but it retained the right to pass on the quantity and the identity of the wholesale buyers (R. 281); *whereas, in New York City* it purchased as a wholesaler and retailed the product to *its own customers, and paid its own salesmen*, being permitted to mark up the goods 15% in selling to retailers (R. 276). In other words, there the defendant made the \$1.00 profit plus a 15% mark up profit on its sales to its retail customers.

Judge Goodman, after several efforts to tie plaintiff down and find out what his theory on the point was, finally asked:

“The distinction you are making is the difference between the defendant paying the full purchase price and adding a profit of an additional amount when they sell it, and that differential being paid as a commission directly.”

To which plaintiff replied: “That is the distinction.” (R. 266).

It is not surprising, therefore, that the trial Judge found that there was no fraud on the part of defendant's officers, and that no misrepresentations had been made by them. (Finding X, R. 29.)

It is not surprising that Judge Goodman, at the close of plaintiff's evidence, commented:

“In my opinion, so far in this case there isn't the slightest bit of misrepresentation or fraud.” (R. 298.)

PLAINTIFF WAS NOT ENTITLED TO ANY COMMISSIONS ON SALES OF HARWOOD AFTER THE SETTLEMENT OF MARCH 8, 1946.

While the record places no emphasis on any claim of plaintiff to commissions on Harwood sales after the settlement of March 8, 1946, some of plaintiff's testimony might be aimed at such a claim. We shall therefore briefly discuss the point.

The complaint alleges the quantity of sales "in the latter part of 1944 and throughout 1945 and 1946" (Par. VII of the complaint, R. 4) and the prayer is for "commissions payable to plaintiff on the sale of distribution of Harwood whiskey * * * during the years 1944, 1945 and 1946." (R. 8.)

Nowhere does plaintiff's pleading attack the integrity of his new contract of March 8, 1946 (part of Plaintiff's Ex. 17, R. 173). He pleads the contract in Par. X of the complaint (R. 6), and fails anywhere to ask its reformation in any particular.

That contract which is with "Williams Importers" provides that plaintiff will receive a specific commission on various products, *in which Harwood whiskey is not included*, and it carries the additional provision:

"On any additional products that may be *handled by this division* for sale in your territory, you will receive a commission in an amount to be agreed upon."

Since *Williams Importers* did not handle Harwood sales, it must be obvious that, under that contract,

plaintiff could recover no commissions on Harwood thereafter. He finally resigned at the request of his employer the following April. (R. 194, 243.)

Yet we find here and there in plaintiff's testimony the suggestion by him that the letter of September 13, 1945 (Plaintiff's Ex. 14, R. 150) was not merely a recitation of what Ravaud had said to plaintiff back in 1943, but a continuing contract that carried on through the settlement into his new contract.

This claim is easily rebutted. At the very moment Jaburg told plaintiff he would give him the letter as to the 1943 conversation, plaintiff quotes Jaburg as saying that plaintiff was not entitled to commissions on Harwood, because "*Williams Importers* did not handle it." (R. 147.) Furthermore, according to his own testimony at the conference with Jaburg, President of defendant corporation about February 25, 1946, the latter told him he, plaintiff, had no claim to commissions on Harwood whiskey. And finally the document which Jaburg signed states that it is confirming a conversation *held in 1943*, and it agrees to nothing. (R. 150.)

And to make the claim still more preposterous, we call the Court's attention to the fact that, on receiving the proposed new contract from Ravaud (Plaintiff's Ex. 17, R. 171-179), plaintiff sent to Ravaud his draft of a proposed contract and he inserted the following provision:

"No products will be shipped to or sold and delivered in your territory by R. C. Williams & Co.,

Inc. or by any of its subsidiaries *except through Western Division of Williams Importers*, and upon which you are to receive a commission of 25 cents per case.” (R. 182.)

However, his suggestion was ignored and plaintiff signed the contract proposed by Williams Importers without any change, which contract gave him no right to any commissions on sales of Harwood Whiskey. Plaintiff did testify that in the Palace Hotel conference, which was some days prior to the preparation of the settlement agreement and of the new contract, Jaburg, Ravaud and Jacobs gave him assurance that he would be protected against any shipment by R. C. Williams into the western territory. (R. 165, 166, 170.) However, thereafter he signed the settlement agreement in which, in consideration of \$10,000 paid him, he waived all claims which he had made or “*might assert in the future on the sales of Harwood whiskey in your territory, as long as this product is not directly handled by the Williams Importers division.*” (R. 172.)

CONCLUSION.

It is the law of this State that a Court should exercise with “great caution” the power to set aside a contract.

Oppenheimer v. Clunie, 142 Cal. 313, 318;

Greenewalt v. Rogers, 151 Cal. 619, 635.

In closing we respectfully submit that, if the rule were that applications such as plaintiff's in this case were to be considered with liberality and leniency toward the plaintiff, the trial Court could not have reached any different conclusion than it did.

Dated, San Francisco, California,
November 30, 1949.

Respectfully submitted,
SULLIVAN, ROCHE, JOHNSON & FARRAHER,
Attorneys for Appellee.

No. 12,242

IN THE
United States Court of Appeals
For the Ninth Circuit

OVE FOG,

Appellant,

vs.

R. C. WILLIAMS & Co., INC. (a corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

DEC 23 1949

PAUL P. O'BRIEN,

CLERK

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IN THE

**United States Court of Appeals
For the Ninth Circuit**

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vs.

R. C. WILLIAMS & Co., INC. (a corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

INTRODUCTION.

Appellee's brief serves only to emphasize the strength of appellant's contentions. It is a confession and attempt at avoidance but in that effort it fails.

The appellant, Ove Fog, was employed by appellee, R. C. Williams & Co., as its sales representative in the Pacific Coast Area. As compensation for his services he was to receive a stated salary plus a commission at so much per case on all liquors shipped into his territory. It was specifically understood and agreed that R. C. Williams & Co. was to make no shipments into Fog's territory except through his division.

This understanding and agreement was confirmed in writing. (Exhibit 14, R. 150.) There can be no dispute about that.

The importation and sale of Harwood whiskey was handled by R. C. Williams & Co. in the identical manner it handled other items upon which it recognized Mr. Fog's right to commissions. It purchased this whiskey from the Agencias Distilladores, sales agent for the distillery, acquired title thereto and resold it at a marked up price.

We may refer for a specific example to the shipment of two carloads of Puerto Rico rum by R. C. Williams into Mr. Fog's territory. This rum shipment was in violation of Mr. Fog's agreement. R. C. Williams & Co. recognized and admitted this and assured Mr. Fog it was a mistake and would not happen again. (R. 94.)

R. C. Williams & Co. recognized its obligation in the Puerto Rico rum situation. Then why should they not likewise recognize their obligation to pay agreed commissions on Harwood whiskey sales?

It is evident from the record that R. C. Williams purposely and willfully from the very first day that Fog demanded commissions on Harwood shipped into his territory schemed to defraud him by over and over again assuring him that they were handling the Harwood shipments, importation and billing as a matter of accommodation on behalf of the Canadian Distillery and not for their own account.

The fact is that R. C. Williams & Co. did handle Harwood whiskey for their own account. Mr. Fog first ascertained the true facts when given a copy of the contract shortly before the time of trial. This contract was introduced as plaintiff's exhibit 20 (R. 270) and undisputably shows that R. C. Williams & Co. purchased the whiskey, imported it into the United States and as owner thereof resold it at agreed and fixed mark up prices.

It was most conclusively established that R. C. Williams owned the Harwood whiskey and sold it in Mr. Fog's territory in the same manner as other merchandise imported by it. Therefore it follows that when R. C. Williams represented to Mr. Fog that "R. C. Williams Wholesale Department have the exclusive franchise of this whiskey for New York, *provided that they accommodate the Canadian distillery by clearing the merchandise for them and doing the billing in the United States* and that Koerner has nothing to do with the sales which are made by representatives of the UDL Distilleries in Vancouver." (Exhibit 6, R. 104.) That those untrue representations could only have been made for the purpose of defrauding Mr. Fog of his commissions. Those statements were wholly false, and must have been knowingly made for it was the outcome of a long meeting between the president of R. C. Williams & Co., Mr. Hugo Jaburg, a Mr. Koerner, the sales manager, and Mr. Jean Ravaud. These gentlemen certainly knew the true facts and condition of the Williams contract with Agencias Distilladores.

Appellee seeks to avoid its obligation to Mr. Fog by claiming that he knew that R. C. Williams “*had something to do with the sale of Harwood whiskey*” when he was induced to make the settlement. This is as far as they dare go. It is not and it cannot be asserted that Mr. Fog knew the *real facts* at the time of settlement. Nor can it be nor is it claimed that his knowledge *was clearly and conclusively established by the evidence.* (*West v. Great Western Power Co.*, 36 C.A. (2d) 403, 414.)

We will not burden this court with a detailed answer to appellee’s brief but feel that there are portions thereof that cannot be permitted to pass without reply.

ALLEGED FALSE IMPRESSION.

On page 2 of appellee’s brief it is asserted that appellant seeks to create a false impression in claiming Mr. Fog worked for R. C. Williams & Co. rather than for Williams Importers. Appellee’s argument is specious but not sound. It is a distinction without a difference. Williams Importers was a department or “desk” of R. C. Williams & Co. and was not a separate or different entity. Mr. Fog was employed by R. C. Williams & Co. The company openly recognized this in confirming in writing the assurance that it would not ship into Mr. Fog’s territory except through his division. (Exhibit 14, R. 150.) In fact it was conceded that there was no issue as to Mr. Fog’s employment by the defendant. It was admitted in the plead-

ings and admitted by defendant counsel at the trial (R. 78) and recognized by the court.

THE DEPOSITIONS ARE PROPERLY A PART OF THE RECORD.

Appellee asserts that the depositions of Hugo F. Jaburg, president of the defendant corporation, and Jean Ravaud, head of the branch of defendant corporation, are not properly a part of the record of this appeal. These depositions were referred to at the trial by defendant's counsel. (R. 299.) They were also used on the motion for new trial and are therefore properly a part of the record. We refer to Rule 26(d)(2) of the Rules of Civil Procedure of the District Courts of the United States for our authority in making use of the depositions.

DEFENDANT'S CONTRACTS WITH DISTILLER'S AGENT.

Defendant did not have a contract with the distillers as was represented to Mr. Fog. Its contract was with the Agencias Distilladores, a Cuban corporation, which held a contract with the distillers for world distribution of Harwood whiskey. R. C. Williams & Co. purchased the whiskey from the Cuban corporation and not from the distillery. It purchased the whiskey for \$19.05 per case and sold it for \$20.77. These prices were fixed in the contract. It acquired title and owned the whiskey f.o.b. Vancouver, Canada. It was authorized, *but not required*, to pay brokerage or selling commissions, *not to exceed* 60 cents per case. According

to the evidence there were no such commissions paid. However this point is not important as to Mr. Fog's right to commissions.

Referring to the deposition of Mr. Jaburg (R. 55) we find under questioning by Mr. Jacobs, counsel for defendant, a reference to a "special Harwood agreement between the distillery and R. C. Williams" and that a brokerage of "60 cents was to be paid to brokers appointed by the distillery." This was untrue as the agreement was not with the distillery but with the Cuban corporation. Again we find in the deposition of Jean Ravaud (R. 64) "that Williams salesmen could not handle Harwood as Harwood was sold through brokers appointed by the distributor in Canada." He could not name any brokers and knew of none on the coast. (R. 65.) There is no evidence that any brokerage was ever paid by R. C. Williams. In fact the testimony shows that all sales were handled directly by R. C. Williams through its Mr. Koerner. (R. 115.) Defendant did not want to pay any brokerage or commissions.

On page 9 of appellee's brief we find a most significant statement which admits and explains defendant's motive in its dealing with Mr. Fog. It is pointed out that there was no sales resistance. It is there asserted that the defendant corporation was *compelled* under its Harwood contract to pay commissions to the distiller's agents. This statement we have established as untrue. R. C. Williams was authorized but not compelled to pay brokerage and commission *not to exceed* 60 cents per case to brokers or sell-

ing agents selected by *it*. (R. C. Williams & Co.) (R. 281.)

The significant statement is as follows: "With no sales burden on the division which employed plaintiff, it is no wonder that defendant corporation did not consider itself bound to pay additional commissions to plaintiff." In other words R. C. Williams wanted to and did retain the 60 cent commission for itself. It did not want to pay Mr. Fog his 25 cent commission. It explains why defendant, in order to accomplish its purpose, misrepresented the situation to Mr. Fog and why it kept him in ignorance of the true facts.

**THE PLEADED CASE AND ALLEGED FAILURE OF
EVIDENCE TO SUPPORT IT.**

Appellee's counsel place great stress upon the allegation in plaintiff's complaint that it was represented that "defendant corporation had nothing to do with the importation or sale of Harwood's whiskey in said western division area." The other allegations in the complaint are ignored particularly the allegation in paragraph IX (R. 5) that "after repeated statements made by it over a period of several months that defendant had not and was not handling the importation into or sale of Harwood's whiskey in said western division area."

It is argued that because plaintiff knew that defendant corporation "had something to do" with the importation and sale of Harwood whiskey that there-

fore plaintiff's case should fail. Plaintiff certainly proved that the defendant corporation did import and sell Harwood whiskey in plaintiff's area contrary to its representations that it did not. The distinction attempted to be made by appellee is immaterial and trivial and does not go to the essence of the complaint.

PLAINTIFF DID NOT KNOW THAT DEFENDANT CORPORATION WAS RECEIVING COMPENSATION FOR THE SALE OF SUCH WHISKEY.

Next appellee asserts that plaintiff knew that the defendant corporation was receiving compensation for the sale of such whiskey by defendant corporation in his area. There is no merit in this. It was at all times represented to plaintiff that R. C. Williams did not import or sell Harwood whiskey for their own account. It was repeatedly asserted that they were only accommodating the distillery by billing and clearing the importations for them. It is true that Ackerman once wrote Fog that the defendant corporation "was *making* not more than \$1.00 per case" on all the Harwood that was sold. But it was further explained that "it was a different deal"; that they were not selling it and that Mr. Fog was not entitled to commissions because all sales were made by the distillery through its agents. That explanation we have shown was false and untrue. Never at any time was a full, frank or fair explanation made as to how Harwood whiskey was sold or that R. C. Williams in fact did import and sell this whiskey for their own account. To have

done so and to fully and fairly disclose the true facts would have defeated defendant's purpose of depriving Fog of his just commissions.

THE PARTIES DID NOT DEAL AT ARM'S LENGTH.

The parties did not deal at arm's length. Plaintiff was the employee of defendant who was in possession of all the facts. In making a settlement with Fog the defendant corporation was in duty bound to make a fair and full disclosure of all the real facts. This it did not do and plaintiff was entitled to and justified in relying upon their representations.

JABURG'S FAIRNESS.

Appellee makes a point of Mr. Jaburg's fairness. They refer to the time the defendant corporation shipped two carloads of rum into Fog's territory (R. 93) in violation of their agreement. Mr. Fog was assured it was a mistake and would not happen again. (R. 94.) This assurance was later given in writing. (Pltf. Ex. 14, R. 150.) But even then Mr. Jaburg asserted "*It was a different deal. We don't sell it,*" (Harwood whiskey) which only serves to emphasize the extent of Jaburg's unfairness and deceit for the evidence conclusively shows that they did sell it.

**THE NEWLY DISCOVERED EVIDENCE AVOIDING
THE SETTLEMENT.**

We take issue with the statement that plaintiff's testimony is evasive or that it reveals a thorough knowledge of the method in which Harwood whiskey was introduced in Mr. Fog's territory. Our statement of the facts contained on page 18 through 23 of our opening brief refute that contention. The facts as therein related prove conclusively that Mr. Fog could not have known the true facts or the actual method by which Harwood whiskey was sold in his territory. All his efforts, month after month, to ascertain the true facts were futile. Those facts when opposed to the representations made by the defendant's officers amount to a demonstrative proof of the misrepresentations and deceit practiced upon Mr. Fog in their efforts to deprive him of his commissions. Throughout their brief appellee's counsel themselves admit these misrepresentations. Time and again it admitted that Mr. Jaburg assured Fog that "it was a different deal", "we don't sell it", they were merely accommodating the distillery, had nothing to do with the sales representation, and the other evasive explanations. Even at the trial it was maintained that R. C. Williams did not sell Harwood. (R. 113.) It is amazing then and bewildering too, that defendant's counsel should contend and the court find that Fog had a thorough knowledge of the method in which Harwood whiskey was handled.

As to the discovery of the true facts subsequent to the "settlement" we point out that they were not ascertained until Mr. Fog was subpoenaed by the

Bureau of Internal Revenue on January 28, 1948. We have sufficiently discussed this feature in our opening brief. But may we point out that the trial court erred in assuming that this information was not material. In the discussion at the time of making the motion the court labored under the impression that Mr. Fog knew these facts prior to the settlement. It stated that this information was contained in a letter (R. 307) "in which a man told about having to pay 60 cents a case." *There is no such letter.* The 60 cents a case brokerage or commission provision was not made known until plaintiff's counsel took the deposition of Mr. Jaburg.

THE CLAIM THERE WERE NO FALSE REPRESENTATIONS.

On page 24 of appellee's brief are cited four representations which we claim were false. It is not denied that they were made. However it is claimed that they were not false and a vague and confusing effort is made to justify that statement. We reiterate that the evidence and the admissions in appellee's brief do establish their falsity. The evidence conclusively shows that:

1. R. C. Williams did sell Harwood for their own account and did not handle it only as a matter of accommodation for the distillery.

2. Sales were not made by distributors for the distillery; R. C. Williams did not merely do the clearing and billing for which it received \$1.50 per case nor did it have to pay the brokers for the distillery their commission out of the \$1.50.

3. R. C. Williams did net more than \$1.00 per case.

4. The agreement was not by contract with the UDL (the distillery in Vancouver) in consideration for the privilege of wholesaling Harwood in the New York metropolitan area, but was with Agencias Distilladores.

Plaintiff's Exhibit 20 (R. 270) irrefutably establishes their falsity.

A DISTINCTION WITHOUT DIFFERENCE.

It is next claimed that the facts discovered by plaintiff after the settlement are a distinction without a difference. We fail to see it. There is a difference. Under the actual and true facts R. C. Williams purchased the whiskey outright for their own account from the Cuban corporation. It was vested with title upon delivery f.o.b. Vancouver. It resold this whiskey through its man Koerner in the United States at an agreed mark up and made a profit of \$1.60 per case. Under those circumstances it was obligated under its agreement with Fog to pay him his commissions. Such procedure was the same as with any other merchandise it imported and paid him his commissions.

On the other hand if R. C. Williams did not take title or ownership but merely as a matter of accommodation cleared and billed the liquor upon sales made by brokers for the distillery then perhaps Mr. Fog would not be entitled to a commission as explained by Mr. Fog. (R. 266.) The reason being that in such

a case R. C. Williams did not sell but would have acted as an agent on behalf of the distillery.

**PLAINTIFF IS ENTITLED TO COMMISSIONS ON SALES OF
HARWOOD AFTER SETTLEMENT OF MARCH 8, 1946.**

When plaintiff was finally prevailed upon to accept the \$10,000 "to take the bad taste out of his mouth", defendant's counsel prepared a settlement agreement that was designed to forever foreclose any claim for commissions on Harwood past, present or future. When the proposed agreement was submitted to Mr. Fog he called attention to the fact that the provision assuring him that R. C. Williams would sell no merchandise in his territory except through his division (Ptff. Ex. 14, R. 150) had been omitted. (See Ptff. Ex. 18, R. 180.) As a result Mr. Fog was called to New York for a conference and at that conference he again brought the matter up. At that time he was assured—"You already have that guarantee. As a matter of fact, you have it in writing." (R. 189.) He was also given the same assurance by Mr. Jaburg. (R. 193.) Those promises were made under the pretense of friendship but with tongue in cheek and with no intention of living up to them. We cite this incident to show how the defendant's officers and counsel carried their perfidy and deceit to the very end in an effort to induce him to accept the "settlement". Under the written assurance referred to Mr. Fog was entitled to his commissions earned after the settlement of March 8, 1946.

SUMMARY.

The decision in this case was made off the bench and in our humble opinion was one of first impression and not after mature consideration of the evidence. The court based its decision, judging from its comments at the presentation of the motion, on the theory that the plaintiff knew the fact that R. C. Williams caused the whiskey to be introduced into this market. Under the court's theory the essence of plaintiff's claim was not the means by which the whiskey was introduced into this market, the papers they signed, the nature of their contract, but the fact that defendant caused the whiskey to be introduced into the market. (R. 304-305.) It stated that Mr. Fog was entitled to commissions and that he would have done better had he been represented by an attorney. (R. 296.) It thus ignored the circumstances under which the whiskey was shipped, the relations between the distiller, the Agencias Distilladores, Williams and Mr. Fog. It evidently placed no importance on the issue as to whether or not R. C. Williams was accommodating the distillery, as it represented, or whether it was importing and selling for its own account. It placed no value on the fact that Mr. Fog first discovered the true facts when subpoenaed by the Bureau of Internal Revenue. The court was in a material and serious error in thinking that Mr. Fog knew that Williams Co. had to pay the alleged 60 cent brokerage stating that it saw a letter to that effect. (R. 307.) In this it was in error because *there was no such letter*. That information first was revealed when the deposition of Mr. Jaburg was taken and later when the contract with Agencias Distilladores was produced. In

all these viewpoints, as a basis for its decision, the court was in error. As the court thus patently labored under an erroneous conception of the evidence and based its decision thereon, the judgment should be reversed.

CONCLUSION.

The court should have considered the evidence in a light most favorable to plaintiff and permitted the trial to proceed to its final and full conclusion in order that all the facts and evidence be before it for its determination.

But nevertheless based upon the record as it stands plaintiff did establish that the defendant did misrepresent the situation. Never was there made a full and fair disclosure of the true facts. Certainly the knowledge of Mr. Fog concerning the real facts which would prevent his relying on or being misled by defendant's representations was not clearly and conclusively established by the evidence. The evidence conclusively shows that it was impossible for plaintiff to have known the true facts at the time the settlement was made. He was entirely dependent on the information given him by defendants and he was entitled to rely upon their statements. We respectfully submit that for the foregoing reasons the order granting the motion for dismissal should be reversed.

Dated, San Francisco, California,

December 21, 1949.

RICHARD TUM SUDEN,

Attorney for Appellant.

No. 12,242

IN THE

United States Court of Appeals
For the Ninth Circuit

OVE FOG,

Appellant,

vs.

R. C. WILLIAMS & Co., INC. (a corporation),

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

RICHARD TUM SUDEN,
605 Market Street, San Francisco 5, California,
*Attorney for Appellant
and Petitioner.*

FILED

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IN THE
United States Court of Appeals
For the Ninth Circuit

OVE FOG,	} <i>Appellant,</i>
VS.	
R. C. WILLIAMS & Co., INC. (a corporation),	
	<i>Appellee.</i>

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Presiding Judge,
and to the Honorable Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

Appellant respectfully requests a rehearing in the above entitled matter.

A rehearing is requested because the opinion of this court in deciding this appeal indicates that the court has fallen into the same misconception of the issues as did the trial court.

This court, as did the trial court, came to the conclusion that the appellant was informed of *all the*

material facts when he executed the compromise agreement. This court further held in harmony with the trial court that certain facts, which admittedly appellant could not have known, were not of “material significance.”

We assert that the unknown facts were of the greatest materiality for had they been known to appellant he never would have entered into the compromise agreement.

It cannot be denied that the grossest misrepresentations were made to appellant as to who was selling the Harwood Whiskey in his territory. These misrepresentations were not expressions of opinion or left to inferences. They were positive and active misrepresentations made with the object, purpose and intent of convincing Mr. Fog that he was not entitled to commissions. These misrepresentations were made from beginning to end and during the entire relationship and particularly at the time the compromise was effected. The parties making these misrepresentations were Mr. Fog's superiors and were the only ones in possession of the knowledge of the real facts. He was entitled to rely upon their statements. And he did rely upon their assurances that R. C. Williams & Co. did not sell it, that it was a “different deal” and that they “regretfully” could not pay him his commissions which they assured him he was not entitled to.

We say again that Mr. Fog was informed orally and in writing, and these writings are in evidence, that Williams & Co. was simply doing the shipping,

billing and clearing as a matter of accommodation for the distillery. He was told furthermore that Williams & Co. were paying the agents and salesmen for the distillery but that this money originally came from the distillery. (R. 127.) Nothing could have been further from the truth.

True the trial court grasped upon the fact that at one time in a letter from Ackerman on February 6, 1945 (Ex. 11, R. 126), Mr. Fog was informed that Williams & Co. "do not make more than \$1.00 per case on all the Harwood that is sold". The trial court and this court, too, construed that to mean that Williams & Co. was making a "profit" of \$1.00 per case. In this it was in error. The word "making" is subject to many other meanings. It could have been a fee, a commission or a form of compensation distinct from a profit. The scope of the use of this word could mean many things. Certainly it is not limited to "profit". Certainly the use of the word "making" was not inconsistent with the explanation given Mr. Fog that they were only accommodating the distillery so as to put him on notice that the explanations and representations made to him were false.

When Mr. Fog commented in his letters on the fact that Williams & Co. were making \$1.00 per case he received a reply from Mr. Ravaud on March 5, 1945 that "Williams & Company has given up the idea of making a profit on Harwood, but will probably handle it just as an accommodation for the salesmen and distributors". (Exhibit 13, R. 145.) This of course

was false and made only to convince Mr. Fog that he was not entitled to commissions.

Important is the fact that the misrepresentations were reiterated and repeated after the date of the letter of Mr. Ackerman as of February 6, 1945. In the intervening year, until the date of settlement March 8, 1946 Mr. Fog was repeatedly assured and impressed with the fact that he was not entitled to commissions. It was in this intervening period that whatever impressions of "profit" that Mr. Fog may have had were wiped out or nullified. For that reason the fact that he once was informed that Williams & Co. were "making" \$1.00 per case should have little or no effect upon the trial, or this court, in deciding the issues of this case. It was a small circumstance but apparently a major one with the trial court but if truly and fairly evaluated it was certainly not such "substantial evidence" as a basis for sustaining the trial court's decision.

True the trial court also grasped upon the fact that Mr. Fog knew that Harwood Whiskey appeared in his territory through the offices of Williams & Co. But that fact was not inconsistent with the representations and explanations given him, in an effort to convince him that he was not entitled to commissions. Nor is this fact such "substantial evidence" as to warrant an affirmance of the judgment.

Eliminate these two factors and nothing remains to support the decision of the trial court. Both of these "factors" are inconsequential and of small cir-

cumstance and certainly do not justify a denial of the relief prayed for by plaintiff.

The courts should not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been defrauded.

Victor Oil Co. v. Drum, 184 Cal. 226, 241;

Simmons v. Briggs, 69 Cal. App. 447, 464;

Rutherford v. Rideout Bank, 11 Cal. (2d) 479, 485.

The trial court stated, as this court pointed out, "The damage to him arises not by virtue of the manner in which the contract was made between the distiller and the supplier; the damage arises because of the introduction and the disposition and the distribution of the liquor in his territory. That is what causes him his damage." The court's meaning is not clear to us, but if we accept that statement according to its common and ordinary sense it proves that the trial court did not comprehend the issues of the case.

It certainly did make a difference as to how the whiskey was sold and handled. The manner in which the contract was made between the distiller and the supplier is the decisive factor in determining Mr. Fog's right to a commission. There could be many arrangements between the distiller and the supplier which would foreclose Mr. Fog's right to a commission. However, under the actual and existing arrangement, which we proved at the trial, Mr. Fog was entitled to his commission. Even the trial court admitted that. (R. 296.)

The effect of the misrepresentations and why it made a difference to Mr. Fog may best be exemplified by quoting Mr. Fog's testimony under examination of defendant's counsel (see R. 207):

"A. I found out that R. C. Williams' representations that they were just clearing the merchandise was absolutely contrary to the fact that inasmuch as they did not import the merchandise on behalf of the distillery, they imported it for themselves, owned the merchandise after it arrived in this country, bought it at one price and billed it at another and made a profit on it, that was contrary to my understanding of clearing it.

Q. What difference would it make to you in your position whether they did it one way or another?

A. The difference to me is whether I was to receive a commission or not, because if they sold the merchandise and shipped it into my territory, I was guaranteed a commission on such sales, but if they were only acting on behalf of the distillery and just making a commission themselves, then it might be possible that I am not entitled to it."

The logic of that statement is clear. He was at all times informed that Williams & Co. was doing the invoicing, billing and clearing as a matter of accommodation for the distillery. They denied that they ever sold it—that word was never used. (R. 263.) The true explanation and real facts were never given Mr. Fog.

We therefore maintain that before Mr. Fog should be bound by the settlement he was entitled to know all the real facts of the situation. He was, at the time

of entering into the settlement, entitled to knowledge of all the circumstances of the transaction so as to enable him to ascertain and know with certainty what his rights were.

“If, as the evidence shows, the real facts were concealed from him by one from whom he had a reason to expect a frank disclosure of all the material circumstances as they occurred, he is not for that reason—no rights of innocent third parties having intervened—to be denied the fullest relief to which according to the principles of equity he is entitled.”

Dickson v. Patterson, 160 U.S. 586; 40 L. ed.

543.

A person upon whom fraud has been practiced has a right to understand *all* of the facts and circumstances, and be fully advised of his rights, before beginning suit—especially if no rights of third parties have intervened. To deny him relief it must be shown that Mr. Fog had actual knowledge of the imposition practiced upon him. It is not enough to show that he might have known or suspected it from data within his reach. Indeed, his knowledge of the real facts which shall prevent his relying on or being misled by *it must be clearly and conclusively established by the evidence.*

West v. Great Western Power Co., 36 Cal. App.

(2d) 403, 414;

Dickson v. Patterson, 160 U.S. 586; 40 L. ed.

546;

Pence v. Langdon, 99 U.S. 578; 25 L. ed. 420.

The conduct of the defendant throughout the entire history of this transaction has not been such as to commend it to the favor of a court of equity. Under the circumstances every doubt and difficulty should be resolved against defendant.

Providence Rubber Co. v. Goodyear, 9 Wall. 788; 19 L. ed. 566.

He who practices bad faith ought not to be permitted to invoke the doctrine of constructive or imputed notice in aid of his wrong doing unless negligence on the part of the injured party supervened.

West v. Great Western Power Co., 36 Cal. App. (2d) 403, 408.

The decision of the trial court in this case is not supported by such substantial evidence sufficient to sustain the court's finding that plaintiff was informed of *all* the material facts when he executed the compromise agreement. The two "facts" upon which the trial court relied were of little real significance and their importance, if any, was nullified and destroyed by the overwhelming mass of misrepresentation *subsequently* made to Mr. Fog right up to the signing of the settlement agreement.

As we understand the effect of the decision of the trial court it is that a party actively engaged in a consummate fraud need only reveal one or two half truths, then submerge or wipe out these half truths subsequently with a mass of falsehoods and untruths and the defrauded party will be deprived of any relief by a court of equity.

Truly the decision in this case places a premium on dishonesty and invites aggression.

For the foregoing reasons we respectfully urge this court to grant a rehearing in this matter.

Dated, San Francisco, California,

February 24, 1950.

RICHARD TUM SUDEN,
*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
February 24, 1950.

RICHARD TUM SUDEN,
*Counsel for Appellant
and Petitioner.*

No. 12244.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH VENA JOHNSON, also known as RUTH BOYCE,
GLADYS VENES, FRANK VENES, a minor, RUTH VENES,
a minor, MARY JANE VENES, a minor, and GLADYS
VENES, as Guardian *ad litem* for said minors,

Appellants,

vs.

GEORGE GARDNER, as Trustee in Bankruptcy for the
Estate of RUTH VENA JOHNSON, also known as RUTH
BOYCE, Bankrupt,

Appellee.

BRIEF OF APPELLEE.

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IN THE

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Appellants,

vs.

GEORGE GARDNER, as Trustee in Bankruptcy for the
Estate of RUTH VENA JOHNSON, also known as RUTH
BOYCE, Bankrupt,

Appellee.

BRIEF OF APPELLEE.

Statement of Facts.

The bankrupt, Ruth Vena Johnson, also known as Ruth Boyce, was adjudicated a voluntary bankrupt on April 24, 1947. [Tr. of Rec. p. 37.] She was a resident of Los Angeles, California. She was not a member of the bar, but was a real estate broker and operator of a real estate school. [Tr. of Rec. p. 38.] The other defendants are her daughter, Gladys Venes, and her daughter's minor children. They were all residents of Scotch Plains, New Jersey.

On December 2, 1944, Ruth Vena Johnson, a bankrupt and proponent of this appeal, owned a piece of real property specifically set forth in the complaint and the decree, having acquired title to it from Lauren W. O'Dell and Grace L. O'Dell, which deed was recorded in Los Angeles County. [Tr. of Rec. pp. 39 and 40.] On April 15, 1944, the bankrupt, who was then a married woman, entered into a property settlement agreement with her husband, Walter G. Johnson, in contemplation of a divorce. In connection with such settlement she acquired a deed from him quitclaiming any interest he had in this real property. [Tr. of Rec. p. 40.] Prior to these occurrences, the bankrupt had become indebted to Harry V. Mooney of San Francisco in a sum in excess of \$10,000.00. Suit thereon was impending, and the bankrupt proceeded to erect protecting barriers around her property.

On December 2, 1944, she transferred the real property in question to her daughter, Gladys Venes, and her daughter's minor children, without naming them, and recorded the transfer in the County Recorder's office. [Tr. of Rec. pp. 40 and 41.] The sole consideration for the transfer, recited in the so-called deed of gift, was love and affection. No consideration was paid nor given to the bankrupt defendant, Ruth Vena Johnson, for this property by the defendant, Gladys Venes, or her minor children. Thereafter on December 14, 1944, seeking to strengthen the protective barrier around her property, this fraudulent bankrupt made another deed purporting to be

a grant deed, conveying the same real property to her daughter, the defendant, Gladys Venes, alone, and took back from her daughter a general power of attorney permitting the bankrupt to manage, live in and collect the income from the real property in question for the bankrupt's own use and benefit. These two transfers, so hurriedly made, were made solely and for the purpose of hindering, delaying or defrauding Ruth Vena Johnson's creditors, and particularly Harry V. Mooney. [Tr. of Rec. pp. 41 and 42.] Mooney obtained a judgment in the Superior Court in San Francisco against the bankrupt after a contested trial, in excess of \$10,000.00 principal, together with interest and costs. [Tr. of Rec. p. 40.] Thereafter on April 24, 1947, Ruth Vena Johnson filed her voluntary petition and was adjudged a bankrupt. [Tr. of Rec. p. 37.] At the time of her bankruptcy, she was indebted to numerous creditors in a sum approximating \$58,000.00, and the assets in the hands of George Gardner, her duly elected, qualified and acting Trustee in Bankruptcy, were and are grossly insufficient to pay her liabilities in full. [Tr. of Rec. p. 42.] The bankrupt also concealed her other property which might have been made available to satisfy the Mooney judgment, either by carrying it concealed on her person, or keeping title to it in the name of a corporation. She never intended to pay the Mooney judgment. [Tr. of Rec. p. 42.]

During the period between the fraudulent transfer and the discovery of it by the Trustee and the trial of this action, the bankrupt collected and used the income from

the property herself, partly for its maintenance, and partly for her own use and benefit. After the trial of this action, brought by George Gardner, Trustee in Bankruptcy, to avoid this fraudulent conveyance before the United States District Court for the Southern District of California, Central Division, Honorable William C. Mathes, United States District Judge, sitting in equity proceedings without a jury, unhesitatingly found that the conduct of the bankrupt was fraudulent; that the transfers were void, and rendered a decree setting the transfers aside. He did not render a decree compelling the bankrupt to account and pay over to the Trustee the rents which she had collected during the period of the fraudulent transfers.

Questions Involved.

The sole question before this court, raised by the appellee here, is whether or not the bankrupt's demand for a jury trial, made on the morning the case was called for trial should have been granted, and whether or not the court invaded her constitutional rights in declining to impanel a jury and try this fraudulent conveyance case before a jury. We shall discuss this question at length in our argument, points and authorities. There are no questions raised here as to the sufficiency of the evidence to justify Judge Mathes' Findings of Fact and Conclusions of Law and Decree.

ARGUMENT, POINTS AND AUTHORITIES.

At the onset of this part of our brief, we wish to call the court's attention to the brazen attempt on the part of this bankrupt to mislead and deceive this court as she has misled and deceived so many others. Her fraudulent conduct did not end with her transferring this property to her daughter and her daughter's minor children back in New Jersey, to defraud Harry V. Mooney, a creditor, nor with her passing a lot of worthless checks for which she was even then serving a term in jail at the time of the trial of this action (see *People v. Boyce*, 87 Cal. App. 2d 828), but she has carried her dishonest and fraudulent conduct up into this court on this appeal.

At the very onset of her brief, at page 2, beginning at line 10, we find the following statements:

“The appellant was represented *by court appointed counsel* who had not demanded a jury. The appellant, herself, brought into court from jail, had demanded a jury. The appellant at the questioning of the court, released Mr. Turnbull as her attorney and acted as her own attorney in the case. She demanded a trial by jury of the issue of fact as to whether the transfer of the property to her daughter was bona fide. The court relieved Mr. Turnbull of representation of the defendant.” (Italics ours.)

The first sentence of that statement is absolutely false and untrue, and Ruth Vena Johnson knows that such statement is false and untrue. We are certain Mr. Lavine, an officer of this court for many years, would not be guilty of making such a bald-faced, untrue statement to the second highest court in the United States unless those facts were given him by the bankrupt, Ruth Vena John-

son, as Mr. Lavine had nothing to do with this case until several months after the trial. In any event, the statement that she was represented by court appointed counsel is one which we must brand as absolutely false and untrue, and our challenge to this statement will be borne out by the record.

The amended complaint on which the case was tried is set forth in the record at pages 2 to 10. The answer of the defendants to the amended complaint is found commencing at page 11 and is verified by Ruth Vena Johnson at page 15 of the transcript. The attorney for all of the defendants was Rupert B. Turnbull. [Tr. of Rec. p. 14.] Nowhere in the record does there appear any indication that Mr. Turnbull, one of the best known bankruptcy practitioners in the United States, was appointed by the court to represent this defendant, or any of the defendants, and that, for the very good reason that no such appointment was made. Mr. Turnbull was engaged by Mrs. Johnson to file the answer, took care of all of the pre-trial steps in this case, and appeared in court the morning the case was finally called for trial. Mrs. Johnson, in open court, proceeded to fire Mr. Turnbull out of the case, both on behalf of herself and her daughter. [Tr. of Rec. p. 21.] This was done in open court, and Mr. Turnbull, in order to protect himself, had asked the court to approve his discharge from the case by this fraudulent bankrupt. She purported to act on behalf of her daughter by virtue of the power of attorney which she held from her daughter, in discharging Mr. Turnbull as her daughter's attorney. [Tr. of Rec. p. 21, line 2, *et seq.*] She claimed that her daughter had written her that she did not want Mr. Turnbull to represent her under any conditions. [Tr. of Rec. p. 22.]

Nowhere in the colloquy between the court and Mrs. Johnson, at the threshold of the trial, is there one solitary word to indicate that the court had appointed counsel for Mrs. Johnson and Gladys Venes in this civil action, or that Mr. Turnbull was so appointed. Were such an appointment made, the writer of this brief would have known it, familiar with the record as he is, and would not, as an officer of this court of long standing, have the temerity to make an unequivocal challenge to the statement contained in Mrs. Johnson's opening brief that she was represented by "court appointed" counsel.

The Demand for a Jury Trial.

The record discloses that this fraudulent bankrupt verified the answer on behalf of all of the defendants, acting through Rupert B. Turnbull, her attorney. She did not at the time of filing her answer, or within ten (10) days thereafter, serve and file a demand for a jury trial, as required under Rule 38-b of the Federal Rules of Civil Procedure, which requires as follows:

"Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issues. Such demand may be endorsed upon a pleading of the parties."

Subdivision "d" of Rule 38 provides that failure to serve such a demand under the rule and file it as required by Rule 5-d constitutes a waiver by the party of trial by jury.

After delaying the trial of this case from February 10, 1948, until it was ultimately brought to trial on November 23, 1948, the bankrupt was brought over from jail where she was serving her time and attempted to be-muddle the controversy still further by first discharging her attorney, Rupert B. Turnbull, both on her own behalf, and on behalf of her daughter, and then demanding a jury trial. The jury panel happened to be in attendance at the time, and upon this demand being sprung upon counsel, for the first time, on the morning of the trial, naturally the writer objected on the ground that the action was one in equity to set aside and avoid a fraudulent conveyance, and to compel an accounting, and was not properly triable before a jury as a matter of right. [Tr. of Rec. p. 17.]

Mr. Turnbull who had appeared at the opening of the trial stated that he did not demand a jury trial under Rule 38, and that it was not intended to be demanded at the time when he was counsel for Mrs. Johnson. [Tr. of Rec. p. 19.] Judge Mathes thereupon declined to im-panel a jury, and Mrs. Johnson, having discharged her attorney, employed by herself and her daughter, proceeded to try the case herself, using her superficial knowledge of the law acquired as the operator of a real estate school and as a real estate broker, to defend against this fraudulent transfer and all of the implications connected therewith. She succeeded in prolonging the disposition of this case from November 23, 1948, when the trial began, until February 10, 1949, when Judge Mathes signed the Find-

ings of Fact and Conclusions of Law and Judgment, after the bankrupt, acting on behalf of herself and the other defendants, had filed a series of scurrilous and defamatory objections and answers to the proposed Findings of Fact and Conclusions of Law, beginning at page 24 of the Transcript, and ending at page 35 thereof.

After the judgment was entered, she again went into action and engaged Hiram E. Casey to serve and file a Notice of Appeal, and then apparently discharged him, for what reason we know not, and persuaded Morris Lavine to take over from there on. She filed an affidavit for leave to appeal to this court *in forma pauperis*, declaring that she was a pauper, and leave was granted to her to proceed *in forma pauperis* under date of April 13, 1949. [Tr. of Rec. pp. 53 and 54.] Nowhere is there any contention made that the dummy transferee, Gladys Venes, or any of the other defendants are paupers. No order was made authorizing these New Jersey defendants to appeal to this court *in forma pauperis*, and none of them have posted a bond for costs as required in Rule 73 of the Federal Rules of Civil Procedure. No such bond has been filed by any of these defendants, and we believe that this court would be justified in dismissing the appeal in so far as the other defendants are concerned in conformity with Rule 73-a of the Federal Rules of Civil Procedure. We do not believe that the estate of a bankrupt should be subjected, by an irresponsible and fraudulent bankrupt, to the expenses and costs of an appeal taken by such irresponsible and fraudulent individual, who

claims on the one hand to have no interest whatsoever in the property, but on the other hand reserves the right to appeal from a judgment which rendered no relief against her whatsoever, on behalf, not only of herself, but on behalf of her dummy transferees.

We would, therefore, suggest to the court the advisability of seriously considering the dismissal of the appeal in so far as the defendants other than Ruth Vena Johnson are concerned by reason of their failure to pay any of the costs here or to post a cost bond.

Were the Defendants Herein Deprived of Any Constitutional Right by Reason of Their Not Being Accorded a Jury Trial in Equity Proceedings?

In the case at bar, the Trustee brought this action under the provisions of Section 70-e of the National Bankruptcy Act to avoid a fraudulent conveyance of the real property situated in the Southern District of California, jurisdiction of which was expressly vested in the District Court under the provisions of Section 70-e of the National Bankruptcy Act. (11 U. S. C. A., Section 110-e.) The bankrupt was joined as a party defendant to compel her to account to the Trustee for rents collected by her and disbursed and appropriated to her own use during the period of the fraudulent conveyance. The relief sought was of an equitable nature throughout. The District Court was asked to cancel the transfer and to vest title to the real property in the Trustee.

In *Brainerd v. Cohn*, 8 F. 2d 13, a leading fraudulent conveyance case in this circuit, this court said:

“To apply the rule of those decisions to the present complaint: It is true the Trustee seeks a money judgment, but he also asks that certain transfers made

by the bankrupt in carrying out a conspiracy to defraud creditors may be set aside, and for an accounting with respect to quantities of personal property taken by defendants, and which has been mixed and confused beyond possible identification with the property of defendants, and for an injunction *pendente lite* against threatened removal or disposition of certain property, part of which belongs to Cohn, but which has been confused with that taken, and for such further relief as he may be entitled to. Relief against such a situation calls for the exercise of the flexible jurisdiction of equity, to the end that the wrongdoers shall not profit by their wrongs and that innocent creditors shall not suffer by them."

In *Barceloux v. Buffum*, 289 U. S. 227, another fraudulent conveyance case appealed from this circuit, after reviewing the facts and machinations indulged in by the bankrupt and the fraudulent transferees, the Supreme Court, speaking through Justice Cardozo, said:

"* * * This being so, the suit in its inception was properly framed as one for money relief, the value of the shares at the time of the foreclosure of the pledge. There was no objection at any stage of the controversy that the case was triable by a jury. *Schoenthal v. Irving Trust Co.*, 287 U. S. 92; *United States v. Bitter Root Development Co.*, 200 U. S. 451.

"* * * In saying this we do not intimate that the objection would have prevailed, if seasonably urged. There were entanglements that may have called for discovery and accounting, at least in possible contingencies. The point will not be labored, for at the trial the defendant did not argue to the contrary, (citing cases) and does not even now. By common consent the suit was tried as one in equity, the fraudulent grantee being held to account as a

trustee *ex maleficio* for the value of the shares which it had fraudulently acquired and then conveyed to someone else. *United States v. Dunn*, 268 U. S. 121; *Independent Coal & Coke Co. v. United States*, 274 U. S. 640; *Newton v. Porter*, 69 N. Y. 133; *Hamilton National Bank v. Halsted*, 134 N. Y. 520. A like recovery would have been permitted if the suit had been at law."

In *Morris v. Neumann*, 293 Fed. 974, the Circuit Court of Appeals for the Eighth Circuit reversed a judgment for money obtained by a trustee in bankruptcy based on a fraudulent foreclosure of a chattel mortgage. The decree of foreclosure was a collusive one. The trustee sued at law and recovered judgment against the fraudulent transferee in the sum of \$5,229.49. On appeal the Court of Appeals for the Eighth Circuit reversed this judgment and remanded it back for the sole reason that it involved the impeachment of a collusive judgment of foreclosure rendered in the courts of the State of New Mexico and stated:

"The judgment is assailed because a part of it is alleged to be tainted by fraud and collusion, resulting in imposition upon the trial court in the determination of a matter within its jurisdiction to hear and decide upon the issues framed. Defendant in error's right of action is based upon this contention. Relief of this nature cannot be accorded by submission to a jury in an action at law. As an essential preliminary to recovery, the judgment of the state court must, in substance, be reopened for vacation or modification. The administration of estates in bankruptcy, as outlined in the act, manifests no purpose of departure from the distinction established between proceedings in equity and at law. Nothing can be more

essential to the preservation of stability in our jurisprudence than a proper regard for the integrity of the decisions of the courts upon matters clearly within their jurisdiction * * *. Such a direct suit involving such impeachment of this judgment may undoubtedly be brought by the trustee in bankruptcy, but the jurisdiction is necessarily in equity. * * *.

“* * * It follows from what has been said that the judgment must be reversed, and the cause remanded, because, while a potential cause of action has been stated, the jurisdiction of the court below at law failed, and the judgment rendered cannot be sustained. Upon the equity side in the District Court such proceedings may be had, and such decree rendered, as the rules and practice in equity may permit.”

The Seventh Amendment to the Constitution of the United States guarantees the right to trial by jury in suits at common law where the value in controversy shall exceed \$20.00. It does not guarantee the right to trial by jury in actions in equity in any event.

In *Trans-Pacific Corporation v. Goggin*, 166 F. 2d 1021, this court in a *per curiam* opinion affirmed a judgment of the District Court for the Southern District of California, reported in 76 Fed. Supp. 623, in which counsel for the defendant raised the question that four bankrupt corporations which had filed under Chapter XI proceedings, proposing a plan of arrangement, could when their plan of arrangement failed, demand a trial by jury on the question of insolvency and the commission of an act of bankruptcy before an adjudication could be entered against them.

In that case Mr. Lavine raised the question as raised here: That these corporations' rights under the Seventh

Amendment had been violated. The District Court held otherwise, and this court affirmed its judgment without opinion.

In the case at bar the relief sought throughout was equitable relief. Title to the property in question stood on the public records in the name of Gladys Venes, a fraudulent transferee. At common law prior to the enactment of the statute of 13th Elizabeth, a debtor had a right to do as he pleased with his property, and at common law his creditors were powerless to circumvent it. Actions to avoid fraudulent conveyances of property—particularly real property—have always been treated and regarded, both in this country and in England, as equitable actions rather than actions at common law. We do not know what kind of a common law action could possibly be brought to avoid a conveyance of real property regular on its face and duly recorded.

As was said in *Glenn on Fraudulent Conveyances*, Section 60, at page 91:

“It has also been suggested that the equity courts could have worked out a doctrine of the same sort in behalf of the creditor. The writer has never doubted that; indeed, instances may be found where equitable relief was given in this sort of case long before the time of Elizabeth. In the following pages it will be shown, the writer hopes, that the contributions of equity to this subject have gone far beyond the statutes, their words, and even, perhaps, their purposes. But there were good reasons at the time for the mercantile public not entrusting the situation to the court of chancery as it was constituted, and as it

was working at that particular period of history. At any rate, it was from Parliament that relief was sought and the relief came in the shape of the Statute of Fraudulent Conveyances."

In a case of an equitable nature, if the court in its discretion decides to invoke the aid of a jury, it may do so, but the jury's verdict is only advisory and does not bind the court. There is no statute requiring a Federal Court to conform to the State practice in equity proceedings, and the defendant in a suit to quiet title in a Federal Court is not entitled to demand a jury trial, although it may be provided for by a State statute. *Van Deventer v. Lott, et al.*, 180 Fed. 378. Equity courts may decide both facts and law, but they may, if they see fit, refer doubtful questions of fact to a jury. *Garsed v. Beall*, 92 U. S. 684; *Fitton v. Phoenix Assurance Company*, 23 Fed. 3.

Both under the former and present rules to send an issue to a jury is within the discretion of the court to do or refuse.

Flagg v. Mann, 2 Summ. 406, Fed. Cas. No. 4847;
United States v. Samperyac, Hempst., 118 Fed.
Cas. No. 16,216-a, affirmed 7 Pet. 222;
Wilson v. Riddell, 123 U. S. 608.

An application for a trial by jury is to be determined in the discretion of the court, and if it appears that the questions involved can be determined more properly by a chancellor, the application for a jury may be refused. *Keyes v. Pueblo Smelting and Refining Company*, 31 Fed. 560. Submitting issues to a jury in an advisory capacity is a matter of discretion of the court. *Federal Reserve Bank of San Francisco v. Idaho Grimm Alfalfa Seed*

Growers Association, 8 F. 2d 92; certiorari denied, 270 U. S. 646. Neither party to a suit in equity brought in a Federal Court has an absolute right to have the question of fact arising in the courts passed on by a jury. *Herdsmen v. Lewis*, 9 Fed. 853.

Conclusion.

We believe that this is the first time a litigant has pretended to seriously contend that an equitable proceeding carries with it a constitutional right to a trial by jury, or a right to trial by jury in any event, in the absence of an express statute permitting it such as Section 19-a of the Bankruptcy Act which expressly provides for the right for trial by jury of an involuntary bankrupt on the issue of insolvency and the commission of an act of bankruptcy.

In the writer's brief in resistance to the petition for Writ of Certiorari in *Trans-Pacific Corp. v. Goggin*, 166 F. 2d 1021, heretofore cited, filed in the Supreme Court of the United States, the Court of Appeals for the Eighth Circuit in *Hirshfield v. Bryant*, 14 F. 2d 931, was cited as follows:

"It is well settled that this provision of the Constitution does not apply to cases of admiralty or equity jurisdiction. *Waring v. Clarke*, 5 How. 441; *Webster v. Red*, 11 How. 437; *Shields v. Thomas*, 18 How. 253. It is equally well settled that proceedings in bankruptcy are of equitable cognizance, and therefore the provisions of the Seventh Amendment are not applicable thereto. Thus, in *Barton v. Barbour*, 104 U. S. 126, it is said:

"The argument is much pressed that, by leaving all questions relating to the liability of receivers in the hands of the court appointing him, persons having

claims against the insolvent corporation or the receiver will be deprived of a trial by jury. This, it is said, is depriving a party of a constitutional right. * * * But those who use this argument lose sight of the fundamental principle that the right of a trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction * * * So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods.' "

The Supreme Court of the United States denied certiorari in the case of *Trans-Pacific Corp. v. Goggin*.

We respectfully submit that this bankrupt who, incidentally, defied her creditors, her trustee in bankruptcy, and indulged, *in propria persona*, in conduct which would not be tolerated by any court on the part of an attorney, and who has even attempted to deceive this court by making it appear in her opening brief that she is a poor, unfortunate pauper after having stripped herself of her property and having put it safely in the name of her daughter living across the continent, and when brought to brook, now states she was represented by court appointed counsel who neglected her defense, should be given short shrift.

We respectfully submit that this appeal, in so far as it includes the defendant, Gladys Venes and her minor children, should be dismissed for the reason that they have

made no showing that they were paupers; have paid no fees, and have posted no cost bond; and that in so far as this appealing bankrupt is concerned, no judgment was rendered against her toward which she can assert a valid or legitimate grievance; and that the judgment should be affirmed. The only grievance that Ruth Vena Johnson can, according to her warped way of thinking assert, is that her Trustee in Bankruptcy, by the decree in this case, has taken away from her property which she thought she had safely placed in her daughter's name for her own use and benefit, and has deprived her of its future fruits. Of course, such a contention would be unconscionable in the eyes of a court of equity, but that is the only possible grievance that Mrs. Johnson can assert.

We respectfully submit that the judgment of the District Court should be affirmed.

THOMAS S. TOBIN,

Attorney for Appellee.

No. 12245

United States
Court of Appeals
For the Ninth Circuit.

MILTON THEODORE SHAFER,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court for
the Southern District of California
Central Division

FILED
AUG - 5 1949

PAUL P. O'BRIEN,

No. 12245

United States
Court of Appeals

For the Ninth Circuit.

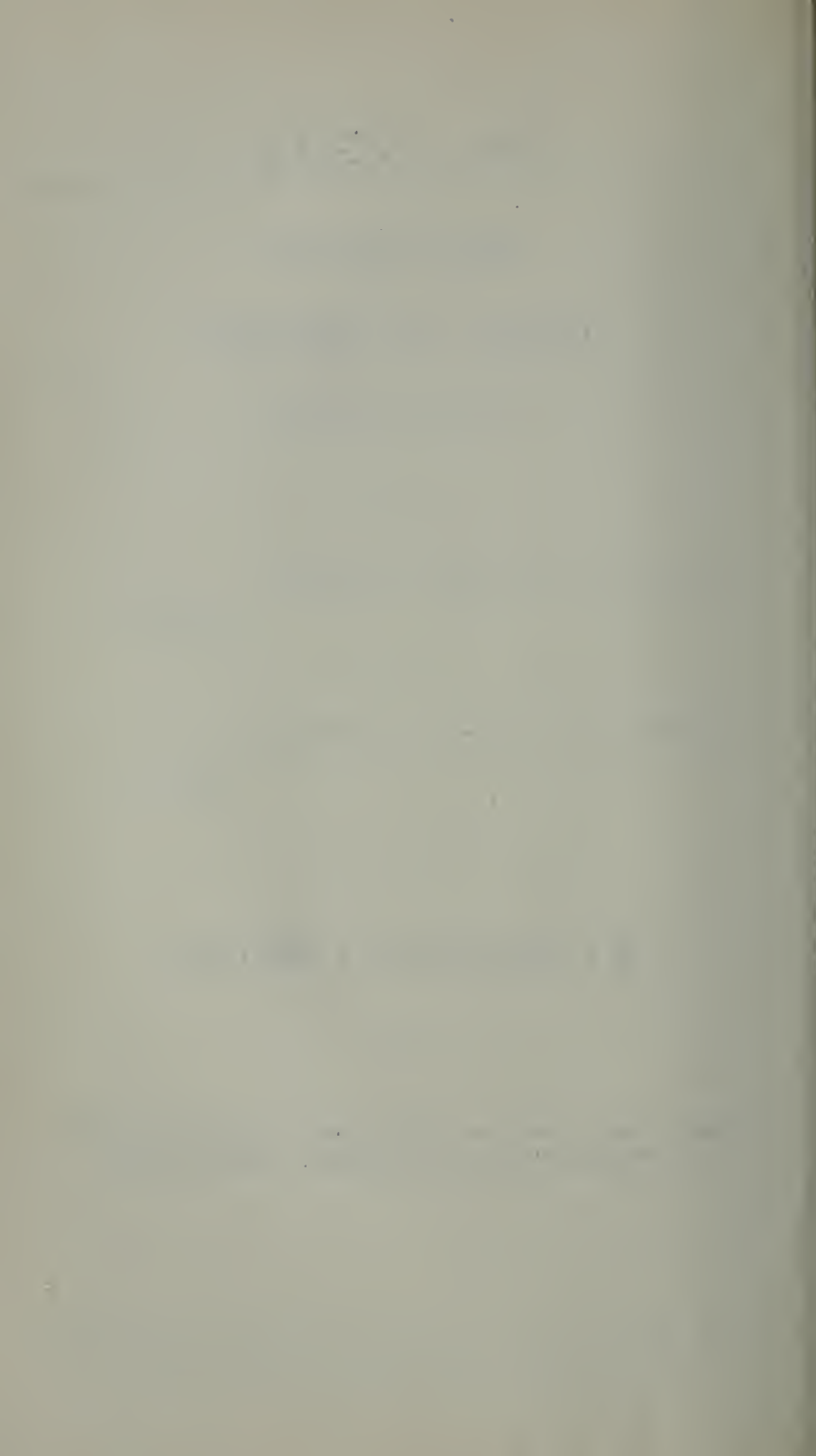
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles 12, Calif. [1*]

* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the United States District Court in and for
the Southern District of California, Central
Division

September, 1948, Term

No. 20401

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MILTON THEODORE SHAFER, THOMAS
WINFREY, and FRED EARL SPELMON,
Defendants.

INDICTMENT

[U.S.C., Title 21, Sec. 174; U.S.C., Title 26,
Sec. 2553(a); U.S.C., Title 18, Secs. 2 and 371—
Illegally concealing and purchasing narcotics,
conspiracy.]

The grand jury charges:

Count One

[U.S.C., Title 21, Sec. 174]

On or about September 23, 1948, in Los Angeles
County, California, within the Central Division of
the Southern District of California, defendants Mil-
ton Theodore Shafer, Thomas Winfrey, and Fred
Earl Spelmon did receive, conceal, and facilitate
the transportation and concealment, after importa-
tion, of a certain narcotic drug, namely: approxi-
mately 227 grains of heroin, which said heroin, as
the defendants then and there well knew, had been

imported into the United States of America contrary to law. [2]

Count Two

[U.S.C., Title 26, Sec. 2553(a)]

On or about September 23, 1948, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Milton Theodore Shafer, Thomas Winfrey, and Fred Earl Spelmon did knowingly purchase a certain narcotic drug mentioned in United States Code, Title 26, Section 2550(a), namely: approximately 227 grains of heroin, which said heroin was not then and there in or from the original stamped package containing said heroin. [3]

Count Three

[U.S.C., Title 18, Secs. 2 and 371]

Prior to the date of the commission of the first overt act hereinafter set forth and continuing to and including the date of the return of this indictment, defendants Milton Theodore Shafer, Thomas Winfrey, and Fred Earl Spelmon did agree, confederate, and conspire, within the Central Division of the Southern District of California, to commit offenses against the United States as follows: knowingly to import and bring into the United States of America, and to aid and procure the importing and bringing into the United States of America, from the Republic of Mexico, and to receive, conceal, and facilitate the transportation and concealment after importation of, approximately 227 grains of heroin,

in violation of United States Code, Title 21, Section 174;

The objects of said conspiracy were to be accomplished as follows:

The defendant Milton Theodore Shafer was to deliver to one Fred Dauge the sum of \$500.00 and said Fred Dauge was then to procure from an unknown source in the Republic of Mexico certain narcotic drugs and transport said narcotic drugs to Los Angeles, California, and deliver the same to the defendant Milton Theodore Shafer;

To effect the objects of said conspiracy, defendants committed divers overt acts in the Central Division of the Southern District of California:

(1) On or about September 9, 1948, the defendant Milton Theodore Shafer had a conversation with Fred Dauge;

(2) On or about September 10, 1948, defendant Milton Theodore Shafer and defendant Thomas Winfrey had a conversation with Fred Dauge;

(3) On or about September 16, 1948, defendant Milton Theodore Shafer delivered to Fred Dauge the sum of \$500.00;

(4) On or about September 24, 1948, Fred Dauge delivered to defendant Milton Theodore Shafer a key to a locker in the Union Station, Los Angeles, California; [4]

(5) On or about September 24, 1948, defendants Thomas Winfrey and Fred Earl Spelmon removed

from a locker in the Union Station, Los Angeles, California, approximately 227 grains of heroin.

A True Bill:

/s/ Illegible Signature,
Foreman.

/s/ JAMES M. CARTER,
United States Attorney.

[Endorsed]: Filed Nov. 17, 1948. [5]

At a stated term, to wit: The September Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday, the 29th day of December, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Peirson M. Hall,
District Judge.

No. 20,401-Cr.

[Title of Cause.]

ORDER SUSTAINING THE OBJECTIONS TO
THE INTRODUCTION OF EVIDENCE ON
COUNTS TWO AND THREE AND GRANT-
ING THE MOTION FOR JUDGMENT OF
ACQUITTAL AS TO APPELLANT UNDER
COUNTS TWO AND THREE

For further (1) argument re oral motion of de-
fendants to dismiss, and (2) further jury trial; Wm.

L. Baugh, Ass't U. S. Att'y, appearing as counsel for Gov't; Wm. Strong, Esq., appearing as counsel for Def't Shafer; Francis C. Jones, Esq., appearing as counsel for Defendants Winfrey and Spelmon; all three said defendants being present on bond; and both sides answering ready, the jury being absent, Court orders trial proceed.

Attorney Baugh argues in opposition to motion to dismiss count 1, and Attorney Strong argues in support of said motion as to count 1. Court overrules objection to introduction of evidence on count 1, and sustains objection to introduction of evidence on counts 2 and 3. Attorney Strong moves for judgment of acquittal as to each defendant on counts 2 and 3, and Court grants the said motion.

At 10:29 a.m. the jury returns into court, and all the defendants being present, and counsel so stipulating, Court advises the jury of the disposition of counts 2 and 3; and trial proceeds as to count 1.

Ray F. Love, heretofore sworn, testifies further. Gov't Ex. 1, 2, 3, and 4 are marked for ident.

At 10:56 a.m. Court reminds the jury of the admonition heretofore given and declares a recess. At 11:15 a.m. court reconvenes herein and all being present as before, including all three defendants and the jury, Court orders trial proceed.

Fred Dauge is called, sworn, and testifies for Gov't. Gov't Ex. 5 is marked for ident. [9]

At noon Court reminds the jury of the admonition not to discuss this cause and declares a recess until 2 p.m. At 2:13 p.m. court reconvenes herein

and all being present as before, including all three defendants and the jury, and counsel so stipulating, Court orders trial proceed.

Fred Dauge, heretofore sworn, testifies further for Gov't. Gov't Ex. 6 and 7 are marked for ident. At 2:35 p.m. Witness Dauge testifies further.

At 3:04 p.m. Court reminds the jury of the admonition heretofore given and declares a recess. At 3:20 p.m. court reconvenes herein and all being present as before, including defendants and jury, and counsel so stipulating, Court orders trial proceed.

Fred Dauge testifies further. At 3:45 p.m. counsel approach the bench and confer with the Court out of hearing of the jury.

At 3:50 p.m., again in the presence of the jury, Fred Dauge testifies further.

At 4:35 p.m. Court reminds the jury of the admonition not to discuss this cause and declares a recess in this trial until 9:30 a.m. Dec. 30, 1948. [10]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant Milton Theodore Shafer Guilty as charged in Count One of the Indictment; and find the defendant Thomas Winfrey Guilty as charged in Count One of the Indictment; and find the de-

fendant Fred Earl Spelmon Not Guilty as charged in Count One of the Indictment.

/s/ DARWIN WILLSON PIERCE,
JR.,

Foreman of the Jury.

Dated: January 4, 1949. Los Angeles, California.

[Endorsed]: Filed Jan. 4, 1949. [13]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND POINTS
AND AUTHORITIES

Comes Now Defendant Milton Theodore Shafer, and moves for a new trial, and to set aside the verdict against him upon the following grounds to wit:

I.

That the court erred in the admission and exclusion of evidence and in its rulings in matters of law.

II.

That the verdict was contrary to law and to the evidence.

III.

That the evidence was insufficient to support or justify the verdict.

IV.

That the Court erred in the matter of instructions refused, and instructions given and not given.

V.

That the presumption contained in the Statute, and as construed and applied in this case, is unconstitutional. [14]

VI.

That the indictment is fatally defective as it does not allege that the Acts charged were committed knowingly or fraudulently.

VII.

That defendant was denied due process of law, and a full and fair trial, guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.

VIII.

That the narcotics involved in this case were seized and confiscated by the government by law in California, and were not in the United States or in Los Angeles contrary to law.

IX.

That defendant Shafer was, if any offense was committed, as a matter of law entrapped into the commission of that offense by officials of the U. S. Government acting in an illegal manner.

X.

That the acquittal of defendant Spelmon by the jury required a verdict of acquittal as to the defendant Shafer as a matter of law.

XI.

That the narcotic drug was at no time, as a matter

of law, outside the possession and control of the United States Government in Los Angeles County, and such possession and control by the Government was exclusive and complete at all times.

XII.

That the jury could not, as a matter of law find defendant Shafer guilty of concealing or facilitating the transportation or concealment of the narcotic in Los Angeles; that there is no evidence of "receiving" by him; that the charge of concealing and facilitating concealment and transportation should have been [15] withdrawn from the jury by the Court.

/s/ WILLIAM STRONG,
Attorney for Defendant
Shafer. [16]

Points and Authorities

A conviction based in any part upon false testimony cannot be sustained, and must be set aside by the trial court.

Hysler v. Florida, 315 U.S. 411

Jones v. Kentucky, 97 F. 2d 335

Declarations and acts of a third person not charged as a co-defendant are inadmissible against the defendant when not made in his presence.

Glasser v. U.S., 315 U.S. 60

Canella v. U.S., 157 F. 2d 470

Braatelein v. U.S., 147 F. 2d 888

Marzano v. U.S., 149 F. 2d 923

The admission of the testimony of the Government official as to statements to him by defendants after their arrest was prejudicial and improper.

McNabb v. U.S., 63 Sp. Ct. 608

Ashcraft v. Tenn., 322 U.S. 143

Bayles v. U.S., 150 F. 2d 236

There is no presumption that a defendant knows his constitutional rights.

Evans v. Rives, 126 F. 2d 633

Cross-examination of a defendant outside the scope of the examination in chief is a violation of the Fifth and Sixth Amendments to the Constitution of the U.S.

Amend. V and VI, Const. of U.S.

Wilson v. U.S., 4 F. 2d 888

Madden v. U.S.,

20 F. 2d 289, cert. den. 275 U.S. 554

Tucker v. U.S., 5 F. 2d 818

Entrapment is contrary to public policy and voids the verdict and prosecution

Sorrels v. U.S., 287 U.S. 434

Butts v. U.S., 273 Fed. 35

Swallum v. U.S., 39 F. 2d 390

Lambert v. U.S., 101 F. 2d 960 [17]

The Federal officers were under the legal duty and requirement of seizing and forfeiting the narcotics in Calexico, and their possession of the narcotic constituted a Government seizure and confiscation as a matter of law.

21 U.S.C. 173, 174

19 U.S.C., 1607, 1608

It was the duty of the officers to turn over to the collector for the district in which the narcotic was first found, the narcotic in this case.

19 U.S.C. 1602

The narcotic by law remained in the district in which it was first found by the officers, and their possession was that of the Government.

19 U.S.C. 1605, 1602-1608

Due process of law under the Constitution requires application of fair and reasonable standards of procedure and evidence in a criminal case, and a fair and full hearing.

Const., U.S., Amends V and VI

McNabb v. U.S., *supra*

Simons v. U.S.,

119 F. 2d 539, cert. den. 314 U.S. 616

This constitutional guarantee includes the right to counsel with adequate time for full and complete preparation at all times, to fully examine, explain and rebut all evidence at all times, including the trial.

U.S. ex rel Mitchell v. Thompson,

56 F. Supp. 683

U.S. v. Dilman, 146 F. 2d 572

Glasser v. U.S., 315 U.S. 60

Wood v. U.S., 128 F. 2d 265

Panoni v. U.S., 281 Fed. 801

Widmer v. Johnson, 136 F. 2d 641

People v. Zammora, 66 Cal. App. 2d 166.

The prosecutor engaged in prejudicial misconduct at the trial.

47 U.S.C. 605

Nardone v. U.S., 316 U.S. 114 [18]

The presumption in the statute is unconstitutional.

Bollenbach v. U.S., 66 S. Ct. 402

No possession of the narcotic was or could have been established as to defendant Shafer as a matter of law.

Williamson v. U.S., 286 Fed. 852.

The indictment is fatally defective.

Crank v. U.S., 61 F. 2d 620

Hood v. U.S., 76 F. 2d 275

Pon Wing Quond v. U.S., 111 F. 2d 751

[Endorsed]: Filed Jan. 17, 1949. [19]

At a stated term, to wit: The February Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 11th day of April, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Peirson M. Hall,
District Judge.

No. 20, 401-Cr.

[Title of Cause.]

For hearing on motion of defendants for a new trial, pursuant to notice thereof filed Jan. 17, 1949, and for sentence; Wm. L. Baugh, Ass't U. S. Att'y, appearing as counsel for Gov't; Wm. Strong, Esq., appearing as counsel for Defendant Shafer; F. C. Jones, Esq., appearing as counsel for Winfrey; both of the said defendants being present on bond;

Attorney Strong moves for the association of Max Tendler, Esq., as counsel for Defendant Shafer, and said defendant consenting, it is so ordered.

Attorney Strong argues in support of defendants' motion for a new trial.

Attorney Tendler argues the insufficiency of the Indictment having to do with knowledge. Attorney Jones renews his motion for a directed verdict of acquittal as to Defendant Winfrey, and argues in support of said motion.

Attorney Baugh argues in opposition to motion for a new trial and for a directed verdict of acquittal.

The Court, after hearing argument of counsel, and being informed of the law, orders motion for a new trial denied and motion for non-obstante verdicto is also denied as to each defendant.

Court pronounces judgment upon each defendant as follows: [20]

District Court of the United States for the Southern District of California, Central Division

No. 20401—Criminal

UNITED STATES OF AMERICA

vs.

MILTON THEODORE SHAFER.

JUDGMENT AND COMMITMENT

On this 11th day of April, 1949, came the attorney for the government and the defendant appeared in person and by counsel, William Strong, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of illegally concealing and purchasing narcotics in violation of Section 174, Title 21, U. S. Code, as charged in count one of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby ordered to pay a fine unto the United States of America in the sum of \$5,000.00 on count one, and stand committed until paid; and, in addition thereto, be imprisoned in an institution to be selected by the Attorney General for the period of one (1) year, but that execution of said sentence of imprisonment be suspended and the defendant placed on probation for a period of three (3) years, the terms and conditions of which are that he shall not violate the law, that he shall forthwith pay said fine, and shall otherwise abide by the rules and regulations of the probation office.

It Is Adjudged that a stay of execution of commitment for non-payment of said fine be granted the defendant until 12 o'clock, noon, April 14, 1949.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ PEIRSON M. HALL,

United States District Judge.

[Endorsed]: Filed April 11, 1949. [21]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Milton Theodore Shafer, 262 So. Rampart, Los Angeles, California.

Name and Address of Appellant's Attorney: William Strong, 923 Chester Williams Building, 215 W. 5th St., Los Angeles 13, Cal.

Offense: Section 174, Title 21, U.S.C.

Judgment: One (1) year imprisonment, sentence suspended, plus Five Thousand (\$5000) fine, and probation for a period of three (3) years; Judgment dated April 11, 1949.

Not Confined at Present: No bail on appeal set as yet.

I, the above-named defendant-appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: Los Angeles, April 13, 1949.

/s/ MILTON T. SHAFER,
Appellant.

/s/ WILLIAM STRONG,
Attorney for Appellant.

[Endorsed]: Filed April 14, 1949. [22]

[Title of District Court and Cause.]

DESIGNATION OF RECORD TO BE USED
ON APPEAL

Comes now the defendant named, Milton Theodore Shafer, and herewith requests the Clerk of the above Court to include the following named docu-

ments in the record to be used on the appeal in this case:

1. The Indictment.
 2. The Plea of Milton Theodore Shafer.
 3. The Demurrer to the sufficiency of the Indictment.
 5. The Judgment of acquittal on Count 2 of the Indictment.
 6. The Judgment of acquittal on Count 3 of the Indictment.
 7. Transcript of the testimony adduced at the trial, and to include all the rulings of the Court on the reception and rejection of the evidence and Exhibits introduced in evidence.
 8. The verdict of the Jury. [24]
 9. Motion for New Trial.
 10. Motion non obstanti verdicto.
 11. Rulings of the Court upon Motion for new trial and upon Motion in arrest of Judgment.
- Dated this 10th day of May, 1949.

MILTON THEODORE
SHAFFER.

By /s/ MAX TENDLER,

Attorney for Defendant.

Received copy of within instrument this 10th day of May, 1949.

/s/ JAMES M. CARTER.

[Endorsed]: Filed May 10, 1949. [25]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 26, inclusive, contain the original Indictment; Verdict; Motion for New Trial; Judgment and Commitment; Notice of Appeal and Designation of Record on Appeal and full, true and correct copies of minute orders of December 6, 1948; December 28 and 29, 1948; January 4, 1949; April 11, 1949, and April 14, 1949, which, together with original plaintiff's exhibits 1 to 8, inclusive, original defendants exhibits A, B and C and copy of reporter's transcript of proceedings on December 28, 1948, December 29, 1948; December 30, 1948; December 31, 1948; January 3, 4 and 7, 1949, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$5.20, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 20 day of May, A.D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] /s/ THEODORE HOCKE,
Chief Deputy.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Mr. Strong: At this point, your Honor, the defendant Shafer moves for the suppression of all evidence in the case on the ground that the indictment does not state a public offense. We would like to argue the matter before your Honor.

The Court: You object to the introduction of any further evidence?

Mr. Strong: That is right.

The Court: What is it, a motion to suppress evidence or an objection to the introduction of further evidence.

Mr. Strong: An objection to the introduction of other evidence and also a dismissal on the ground that the indictment does not state a public offense.

The Court: You would like to argue the matter?

Mr. Strong: Yes.

The Court: The jury will retire to the jury room and wait until you are called. Remember the admonition.

The witness may step down during the course of the argument.

(Witness temporarily excused.)

(The jury retired from the courtroom at 2:30 o'clock p.m.)

The Court: All right, Mr. Strong. [17*]

Mr. Strong: If the court please, at this time I might state or would it be possible to have the court

* Page numbering appearing at top of page of original Reporter's Transcript.

consider any objections made by one of the defendants as being made on behalf of all regardless of the one making them?

The Court: If you desire that.

Mr. Jones: Yes, sir.

Mr. Strong: It will be binding upon both and all of the defendants regardless of who makes the objection unless we expressly indicate we do not want to be bound thereby.

The Court: If that is agreeable to other counsel, that will be the order.

Mr. Jones: Yes, your Honor.

Mr. Strong: If your Honor please, this indictment fails to state an offense.

Directing your Honor's attention to count 1 of the indictment, your Honor will see that is laid under Title 21, Section 174.

Title 21, Section 174, is predicated partly upon Title 21, Section 173. Title 21, Section 174, says that if any person fraudulently or knowingly imports or brings into the United States—the indictment fails to set forth in any place in count 1 that any of these acts was done fraudulently or knowingly by either of the defendants.

The Court: Count 1 does. Count 1 is in several alternatives: "If any person fraudulently or knowingly imports or [18] brings any narcotic drug into the United States or any territory, or assists in so doing, or receives, conceals, buys, sells or in any matter facilitates the transportation, concealment or sale—"

Mr. Strong: It is our position the word "fraudulently" or "knowingly" applies to all of the alternatives.

The Court: That is correct. They have charged here that they did receive, conceal and facilitate the transportation after importation, and the last line says: "The defendants well knew it had been imported into the United States of America contrary to law."

Mr. Strong: That knowledge below is a knowledge which is required separate and apart from the requirement of the statute that the act itself of importing or receiving or controlling or concealing shall be done fraudulently and knowingly. That act of concealing or receiving or facilitating the transportation and concealment, that act in itself has to be fraudulently or knowingly separate and apart from the fact. In addition there is a further requirement that what it is that cannot be received, concealed or facilitated—or the transportation of it facilitated or concealed, is a drug—a drug which is a drug which had been imported as the defendants knew, contrary to the law.

Those two are separate requirements of knowledge and the first requirement—— [19]

The Court: In other words, your position is they must knowingly conceal it.

Mr. Strong: They must fraudulently or knowingly receive, conceal or facilitate the transportation of it.

The Court: And the second is that they must know it was imported contrary to law.

Mr. Strong: Yes. And the statute itself in certain instances eliminates the knowledge as to the second part, in certain instances, by a presumption which is written into 174 but that only goes to the second part, as to the knowledge of it having been imported contrary to law.

But the offense that is actually charged here has to be alleged in the terms of the statute of having been committed fraudulently or knowingly, the actual act, which is the offense of concealing.

The Court: Do you have any authorities on that?

Mr. Strong: I have a number of cases in which these allegations were required as to the mental operation of the defendants. One for example is *Hurt vs. United States*, 76 Fed. (2d) 275, which talks about the indictment being sufficient but that indictment charged all of these necessary elements, the mental elements. This is a felony, your Honor. The government here has completely failed to allege anything here which deals with intent which, of course, is a very necessary element of a felony and must be alleged. [20]

Now, very often it is stated in an indictment that the defendants did it feloniously or unlawfully or wilfully and that the acts done were done with that mental intent. The statute requires that that intent be alleged. It requires that the specific words "fraudulently or knowingly" be alleged. The Congress didn't require that the act be charged and be

shown to have been done wilfully but it did require that it be done fraudulently or knowingly and the government has failed to charge that.

The government in effect has failed to charge one of the most necessary elements of the offense and that is the frame of mind. This is a felony, your Honor.

I have another case, Pon Wing Kwong (phonetic), 111 Fed. (2d), which deals with indictments, but these types of indictments have these mental intentions alleged. There is no such allegation here.

I think your Honor will agree a felony has to contain a mental element and an allegation of it and the specific one here, as the Congress saw fit and has a right to select, was that it be done with a mental element of fraudulently or knowingly and the government here has wholly failed to allege and consequently one of the necessary elements of the offense is entirely lacking from this count. [21]

The charge does not contain it and for that reason the charge is void. The indictment is bad as to Count One on its face.

The Court: What are your other points?

Mr. Strong: Count two deals with a felony. In Count Two they say that the defendants knowingly purchased the said narcotic drug. The only difficulty with that is that Congress under Title 26, Section 2558, which I presume is a misstatement to some extent, because the actual violation is under 2553. Oh, I may say another thing as to Count One if I may.

The importation of narcotic drugs, the prohibition on the importation, which is Title 21, Section 173, which is the preceding Section to 174, and 174 simply makes the Act the same, but the preceding Section does not prohibit the receipt or concealment or facilitation of transportation and concealment after importation or drugs in all increases. There are various exceptions set forth.

In this Section, Section 173 of Title 21, the exceptions are enumerated. The Government hasn't stated in its indictment that this drug was imported contrary or outside of those exceptions.

The Court: Yes. It says "contrary to law."

Mr. Strong: Contrary to law, but there are certain specific exceptions—— [22]

The Court: If it is contrary to law it is not within the exceptions.

Mr. Strong: Well, the exceptions have to be specifically negatived.

That is the second basis for Count One aside from the others.

As to Count Two as I started to say to your Honor, Section 2553 of Title 26, Section 2553-A to be specific, states that it shall be unlawful for any person to do all of these acts except when the drugs mentioned are in the original stamped package or from the original stamped package. In addition to that these are these various exceptions to that Section also, your Honor.

Our first basis here is that the Government has to specifically negative the exceptions in the count itself in the indictment.

The second basis is that the word “knowingly” doesn’t provide in the indictment the requisite allegation—proper mental intent on the part of the persons charged. This is again a felony as your Honor well knows. The Congress has a right to give various degrees of required intent in order to charge an offense. In some cases they use the word “knowingly.” Knowingly is a degree of intent which is by far less in effect than wilfully.

* * *

The Court: Mr. Baugh, as to Count 1 I am somewhat impressed with counsel’s argument. Any person who fraudulently or knowingly imports or brings any narcotic drug, or assists or in any manner facilitates the transportation or its sale knowing the same to have been imported contrary to law. It would seem to me that it is an essential element of the offense to be charged that they knowingly did receive, conceal and facilitate knowing that it was imported contrary to law.

Mr. Baugh: I will begin my remarks, if your Honor please——

The Court: You cured that in the conspiracy count. You allege it is a conspiracy to commit offenses against the United States as follows: Knowingly to import and bring into the United States and to aid and procure, and I take it that there the “knowingly” goes also to and knowingly aid as if it read, and to knowingly aid and procure and knowingly conceal, facilitate, and so forth. So in your conspiracy count that element is alleged.

Mr. Baugh: I would like to preface my remarks by a mention which is superfluous and that is that I am not prepared to argue this issue by the citation of any authority and I am constrained to simply rely upon my sense of logic in these premises.

Assuming that “knowingly” is a word that does modify “receives, conceals, etc.,” it would seem to my mind that the [28] allegation that the defendants did receive and conceal and facilitate the transportation and concealment after importation knowing that the narcotic had been imported contrary to law, would by necessary inference mean that they didn’t do it unconsciously, and it seems to me that it is not only by necessary inference but that it is implicit and that this was done knowingly. The only thing that is possibly missing is for the word “knowingly” to be explicit in its appearance in the indictment.

The Court: That is an essential element of the offense, and an indictment does not state an offense unless it contains and states all the essential elements of the offense. Certainly that would be true in connection with narcotics because narcotics can be legitimately dealt with. They can be legitimately transported, concealed I suppose—everybody who legitimately deals in narcotics conceals them; they probably have to or somebody would steal them.

Mr. Baugh: Perhaps it is specious argument, but to say that some people receive something knowing that it had been imported contrary to law would

certainly mean that they were conscious when they received it and that they knew that they received it. I have already prefaced my remarks with the fact that I have no cases in point on the subject, and I don't think that counsel has produced any cases in point on the subject. I have not read the cases that he had made reference [29] to.

The Court: He states that they plead "knowingly." What are those two cases, Mr. Strong?

Mr. Strong: Those cases which specifically plead all the elements, one is Hood vs. United States, 76 F(2d) 275. And I have just been advised that in this Circuit there is a similar case where this question was involved in connection with another statute, United States vs. Crank.

The Court: What is the citation?

Mr. Strong: We don't know the citation. But it went to the Circuit Court and the Circuit held that you had to allege those elements. I will try to look up that case for you.

The Court: Maybe I had better give you both a little recess.

Mr. Baugh: Very well, your Honor.

Those two cases, I might say, that the court mentioned, the court got a response to only one, 76 F(2d) 275.

Mr. Strong: I have some others here.

Mr. Baugh: The other one was 111 F(2d) 751.

Mr. Strong: Then I have another case at 2 F(2d) 969.

The Court: And the Crank case?

Mr. Strong: That is the one we don't know the citation of. That is in this Circuit.

* * *

The Court: Let me look at this. [30]

The Court: The defendants are present in person and by counsel.

Have you completed your research, counsel?

Mr. Baugh: If your Honor please, I have not completed the examination I would like to make of the law but I have used the time that the court has so kindly made available in these few minutes.

I would like to say first of all that I think I made a mistake in assuming that it was proper to assume that the words "fraudulently" or "knowingly" modified the words receive or conceal. I would like if I may to demonstrate the impropriety of that assumption this way:

If the court will look at page 2 of the trial memorandum, we will find a copy of Section 174 of Title 21. It reads as follows:

"If any person fraudulently or knowingly imports or brings in a narcotic drug, into the United States or any territory under its control or jurisdiction contrary to law or assists in so doing——"

I want to stop there if I may and in our imaginations I would like to place a semi-colon there for further reference later.

Now, if we skip from that point down to line 16 and the last three words and continue to read that way: "knowing the same to have been imported contrary to law." [33]

Well, it is ridiculous and redundant to say that if anybody imports it unlawfully knowing the same to be imported contrary to law—that is redundant.

So, I do think that it is true that where we placed our semi-colon in our respective imaginations is a proper place to interpret the actual presence of a semi-colon because it only is at the point where that semi-colon has been placed that this “knowing the same to have been imported contrary to law——”

In other words, anybody who receives—beginning at the end of line 13, “conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in,” and then “knowing the same to have been imported contrary to law,” it seems to me that that makes it obvious that fraudulently and knowingly do not modify the words “receive” or the word “conceal” and so forth. [34]

Now we are talking in this indictment about what was implicit but failed to appear as explicit, to wit, the word “knowingly.” Now counsel in his effort to interpret this statute is trying to argue that implicitly “fraudulently and knowingly” modifies “receives.” Well, it doesn’t actually. It is only an interpretation that would produce that modification.

And, further, if the court please, I think that there is no magic in the word “knowingly” located at any particular spot in the indictment. I think that if the indictment, in substance, alleges knowingly that “knowingly” is alleged for all substantive, legal and practical purposes.

Now you can't receive anything very well unconsciously, referring now to the indictment. You can't conceal anything unconsciously. Concealing something is a conscious act, and that has to do with the mind. You can't conceal something unless you know you are concealing it or that you know you are trying to conceal it.

Now you read on down here and you will find that it is alleged that these defendants then and there well knew that the heroin had been imported into the United States contrary to law. Well, if they knowing that the heroin was imported contrary to law, consciously received it, consciously concealed it—and you can receive and conceal only consciously—then they knowingly received it and knowingly concealed it. [35] Counsel has not cited any authority whatsoever that is in point in any particular in this case. He is simply arguing by inference and without citation and authority.

Reference was made to the Crank case, and that is 61 F(2d) 620, and I will simply read the first syllabus here which says:

“Indictment charging accused ‘knowingly, wilfully and unlawfully received intoxicating liquor * * * unlawfully imported’ held defective for failure to charge knowledge of unlawful importation.”

Well, that is the reverse English and there of course that is obviously a correct determination of the law because the man had to know that this liquor that he imported was unlawfully imported. That was an essential element.

But here we have alleged the essential element. We have alleged, just to make it brief, that he concealed—just one word is enough—concealed stuff—and that is the word they use in the vernacular of those who use narcotics—which the defendants then and there well knew had been imported contrary to law.

I read from the case of *Rumley v. United States*, 293 Federal Reporter. The case begins at 532 and I read from page 547:

“The general rule is that the term ‘wilfully’ [36] cannot be omitted from an indictment when the term is part of a statutory definition. (Citing Wharton’s Criminal Procedure, 10th Edition, Volume 1, Sections 285 and 318). But it has been held that where the facts alleged necessarily import wilfulness the failure to use the word ‘wilfully’ is not fatal to the indictment. (Citing cases).”

I submit, if your Honor please, by cold analysis and proper interpretation the words “fraudulently and knowingly” do not modify “receives and conceals.” And I submit further that even if they do that the substance of that which is alleged in Count 1 of the indictment does charge knowingly received and concealed and facilitated the transportation and concealment as alleged in the indictment.

The Court: What have you to say as to Count 2?

Mr. Baugh: With respect to Count 2, if the court please, it is my analysis of the statute which in so far as I am able to read it says nothing of mental

attitude, that the use of the word “knowingly” is a sufficient description of the mental attitude.

The Court: For “unlawfully”?

Mr. Baugh: Your Honor please, I do not understand your Honor’s question.

The Court: Is it a sufficient substitute for “unlawfully,” for a person unlawfully to purchase a certain narcotic [37] drug, because you can lawfully purchase a drug?

Mr. Baugh: But, if your Honor please, it is totally impossible to lawfully purchase heroin——

The Court: Not from the original stamped package?

Mr. Baugh: Yes.

The Court: How do you know?

Mr. Baugh: When the heroin was not then and there in or from the original stamped package.

The Court: Suppose you get a prescription from a doctor for heroin and you go to a drugstore. You would knowingly purchase it. And the druggist would come out and give you the package. Maybe he got it not from the original stamped package.

Mr. Baugh: Yes, but if I knew that he took it not from the stamped package—— [38]

The Court: But you don’t say that. You say he did “knowingly purchase which said heroin was not then and there in or from the original stamped package containing said heroin.” You don’t say that he knew that, that he knowingly purchased it.

Mr. Baugh: I must confess that your Honor’s statement of that situation——

The Court: I think we had better recess the case until 9:30 tomorrow morning and argue it some more. You had better research that and also with reference to your conspiracy count, “knowingly to import” and so forth, “and bring into the United States of America,” and “to aid and procure the importing and bringing into the United States of America from the Republic of Mexico and to receive and conceal.”

You don’t charge that. Under the Crank case the question arises in my mind whether or not even under your conspiracy count, you should not have also alleged at or about line 13—you have the indictment before you?

Mr. Baugh: Yes, I do, thank you, your Honor.

The Court: “knowing the same to have been unlawfully imported.”

Now, I think that you have stated an offense in your conspiracy count because you have at least alleged that they conspired knowingly to import and bring into the United States of America this heroin which is in violation of the [39] first clause of Section 174. But I think that I will recess the matter until 9:30 tomorrow morning in order to give counsel further time to examine the cases.

I do find a case in Federal Second, a Ninth Circuit case. It is Sam Wong versus United States. There the court sustained the indictment under the narcotic clause which charged that he feloniously and fraudulently did receive, conceal, buy, sell and facilitate the transportation and concealment and distribution after the importation. Well, it does

say there the defendant knew it had been imported contrary to law. I thought that case was different than the Crank case. That is my mistake.

However, I will put the case over until 9:30 tomorrow if you wish some further time to examine into the authorities on the subject.

Mr. Baugh: Your Honor has not decided with respect to the first count and perhaps all of that can be gone over tomorrow.

The Court: Well, I think perhaps it had better because in order to reach the conclusion which you have urged, and which may be logical by virtue of the illogic of requiring one to knowingly violate the law, to knowingly import and know it was imported. It would seem that the phrase "knowing the same to have been imported contrary to law" would modify and apply to the words receive or conceal or buy [40] or sell or in any manner facilitate the transportation and concealment and so forth. But the question still is whether or not the word "knowingly" in the first clause applies to the phrase "receives, conceals" and so forth.

In that connection I have had recourse to the original statute and it differs from the re-print in the Code in that after the word or the phrase "or assist in so doing" there is a comma whereas in the Code that comma appears to have been omitted in transposition, so that it would and could be a logical place in the sense which was attempted to be expressed by the sentence.

The Court: Are you ready to proceed?

Mr. Jones: Yes, your Honor.

Mr. Strong: Yes, your Honor.

Mr. Baugh: Yes, your Honor.

The Clerk: Case No. 20401, United States vs. Milton Theodore Shafer, Thomas Winfrey and Fred Earl Spelmon. Is the defendant Shafer here?

The Court: Let the record show the jury is absent and that the defendants are each present in person and by counsel.

Mr. Strong: So stipulated.

Mr. Jones: Yes, your Honor.

Mr. Baugh: So stipulated.

The Court: Mr. Baugh.

Mr. Baugh: Yes, your Honor.

The Court: Have you conducted further research in connection with counts 1 and 2?

Mr. Baugh: If your Honor please, I have——

The Court: I don't think either count 1 or 2 are good.

Mr. Baugh: Then if I may——

The Court: I think as to count 3 it does state an offense—"knowingly to import and bring," that is a conspiracy, to "knowingly import and bring into the United States [46] of America and to aid and procure the importing and bringing into the United States of America from the Republic of Mexico approximately 227 grains of heroin."

While it is charged there that there was a conspiracy to import and also to conceal, it does not charge them with knowingly receiving and con-

cealing and facilitating the transportation and concealment after importation of approximately 227 grains knowing it to have been imported contrary to law.

Nevertheless, I think it is sufficient to state an offense—the offense which I have just described and the remainder of it may be regarded as surplusage.

I have thought a great deal about this case, counsel, and I think it is absolutely a necessary element of the offense to allege that they knowingly received, concealed and facilitated the transportation of it knowing it to have been imported.

Mr. Baugh: May I be heard briefly on that?

The Court: Maybe you can talk me out of it. Lots of people have.

Mr. Baugh: I will do my utmost to that end.

I address myself to count 1 and for convenience I ask the court, if the court will, to turn to page 2 of my trial memorandum. There is a copy of the statute there.

The Court: Yes. [47]

Mr. Baugh: As I suggested yesterday that we place a semi-colon for purposes of clarification in this argument after the word “doing” at line 13.

The Court: In the statute as originally enacted by Congress there is a comma and that is controlling.

Mr. Baugh: Yes.

The Court: That is controlling over the codification by the publisher.

Mr. Baugh: Yes, your Honor. Now, I think we will observe that from the beginning of that statute down to where I would like to interpret the presence of a semi-colon, they are talking about the importation or bringing of any narcotic drug into the United States.

This statute says that doing that contrary to law is a violation. That is what is said in substance to the point where I would have the semi-colon placed.

Thereafter they deal not with the importation contrary to law, but they deal with receiving, concealing, etc., which means, in effect, dealing in narcotics which are already in the United States—to make it wrongful to so deal. That clause says it is wrongful to so deal if you know that that which you are dealing in has been imported contrary to law. In other words, I think there are two ideas—one is importation contrary to law—

The Court: Concealment and selling. [48]

Mr. Baugh: No, if your Honor please, I would like to point out that on the one hand the first clause has to do with importing or bringing into the United States contrary to law—narcotics. On the other hand, after that semi-colon I want to insert—we are talking about dealing in the commodity when we know that it was imported contrary to law. In other words, I think there are two different ideas there and that it is sufficient where you are dealing with the second part—that is with respect to the dealing in narcotics, it is

sufficient to charge in an indictment that you receive it or conceal it or buy it knowing it to have been imported contrary to law.

That is our position. [49]

That is my position. It occurs to me that that is logical and that it is consonant with a proper construction of the statute.

Now in conjunction with that interpretation, as it has application to Count 1, I would like to turn to Count 3 and show how that interpretation has been carried over into the conspiracy count. There it is alleged, beginning at line 9 after the colon, that "knowingly to import and bring into the United States of America, and to aid and procure the importing and bringing into the United States of America from the Republic of Mexico, and to receive, conceal and facilitate the transportation and concealment after importation of" so many grains of heroin in violation of the United States Code Title So-and-So, Section So-and-So.

In other words, there we have used the word "knowingly" at line 9 and "in violation of the United States Code" at line 13 together.

I believe, if the court please, that that is proper, and I believe that "knowingly" and "in violation of the code" affects all that is between those words, between "knowingly" and the phrase mentioned.

The Court: Counsel, if that is the case all you need to do is file an indictment and say that John Doe has violated Title 21, Section 174 of the United States Code. If you can supply any part of it by

reference to the code then you can [50] supply all of it. But that is not the rule.

Mr. Baugh: We can say, can we not, "knowingly in violation of law," and that is what the statute says, Section 174, "If any person knowingly imports (this stuff) contrary to law."

The Court: But you do not say that. You say it is in violation of Title 21.

Mr. Baugh: Yes, your Honor. Well, that is my position.

The Court: I do not know, since you have been talking I may have changed my mind about both Count 1 and Count 3 now. Maybe I think Count 1 is good and Count 3 is bad.

Mr. Baugh: Very well, your Honor. That is our position.

The Court: Let me hear from the defense as to Count 1. Counsel has almost convinced me that he is correct.

Mr. Strong: If your Honor will look at the Crank case.

The Court: Yes. I looked through it very carefully and I read it again this morning.

Mr. Strong: Then there is another case, several cases, that I can give to your Honor. And even the government's own case in its instruction—look at what the government says in Instruction No. 5—they are shifting from one foot to the other as they go along here. That is the instruction offered by the government. In the last paragraph it says:

"The statute is in the disjunctive, that is,

it uses the word 'or,' defining it as a crime to either knowingly receive, conceal * * *"

And they cite the Miller case. If your Honor will read the Miller case you will find that that is right, that those words "knowingly" apply to "receiving" and "concealing."

Now this is not the only statute that is phrased in this language, your Honor. There are dozens of statutes. And under every single one, as far as I can find, where the question came up the words "knowingly" and "fraudulently" or either one, where they were in the disjunctive, were required to be present in the indictment in connection with the receiving or concealing or the selling in the second part.

Now what counsel for the government wants to do here is to arrogate unto himself a function of Congress. He wants to put a semi-colon where Congress didn't put one.

The Court: No, he is defending an indictment drawn by somebody else.

Mr. Strong: But he is talking about the statute. He says, for the purposes of construing the indictment, let's put a colon in the statute. As your Honor rightfully pointed out, the difficulty with that is that Congress only put a comma there and didn't put a semi-colon there.

The Court: Let me look at the Miller case. (Examining citation.)

Well, the Miller case does not pass on the sufficiency of the indictment. Incidentally, it does not

appear to contain [52] the language of the indictment.

Mr. Strong: It appears on page 316 in the first paragraph, your Honor.

The Court: I see. (Examining citation)

Well, the long and short of it is that neither one of you have been able to find any case strictly construing the statute, that is, construing the statute with reference to whether or not the words "fraudulently" and "knowingly" apply to "receive," "conceal," and so forth.

Mr. Strong: May I continue with my cases?

The Court: Have you one? Just give me one.

Mr. Strong. There are no cases which hit it on the nose except the Cronk case.

The Court: No, it does not hit that part on the nose, it hits the other part of it.

Mr. Strong: It hits the bottom part.

The Court: There they omitted to say if they knew that it had been imported contrary to law.

Mr. Strong: Here is the Pon Wing Quong case, decided in 1940, where the court says, at page 753, where he talks about the first count, the second count and the third count.

"The first count accuses appellant with fraudulently and knowingly importing into the United States a certain quantity of smoking opium contrary to law * * *

"The second count accuses appellant with fraudulently and knowingly facilitating the transportation of the smoking opium . . . after its importation and contrary to law * * *

“The third count accuses appellant with fraudulently and knowingly concealing and facilitating the concealment of smoking opium after its importation * * *”

Then it goes on, at page 755, discussing the first count, and the court says this:

“Of course the accusatory allegations must be in the count of the indictment, and they are properly set forth therein.”

Then the court continues:

“The first point reserved as to the second count of the indictment is exactly the same in principle as to the first count and our discussion and cited authorities there apply.”

Again, although it isn't done directly, the Ninth Circuit has indicated that those elements which are set forth are the proper elements and must be set forth.

In addition to that we have the Wardfell case in the Ninth Circuit, 67 F(2d) 967. That deals also with 21 USC 174. On page 968 of that case the statute is discussed and then the indictment is discussed. There again he was charged [54] with “fraudulently” and “knowingly” concealing and facilitating the concealment of a lot of morphine.

The Court: In all the cases they had that in the indictment, all that I have been able to find. Have you been able to find any that do not have that in the indictment?

Mr. Strong: No. But that is a necessary element. One of the ways of determining whether it

is a necessary element is to see what the courts have done with it. [55]

Now, in the Crank case—may I read to your Honor some of the material here? Of course I don't have to go into all the basic rules of the indictment requiring the setting forth of all the necessary elements. That goes without saying.

Under the Tariff Act of 1922, which is the one that dealt with the same kind of allegations as in the Crank case—knowingly conceal and so forth, the court said the second part was necessary and that the first part didn't carry over to affect the second part. You have to have the two knowledges in there, one on top and one on the bottom.

The Court: No, they didn't say that in the Crank case. They didn't say anything about the first knowledge. They just mentioned the second one.

Mr. Strong: If your Honor will look at page 622 at the beginning of the paragraph it says:

“In order to secure a conviction under Count Four”,

which is the one that they are dealing with,

“it was necessary that there should be proof that the accused had knowingly received, concealed, bought, sold, or in some manner facilitated the transportation, concealment, or sale of such merchandise; that it had been unlawfully imported and that appellant knew that it had been unlawfully [56] imported”.

The next paragraph of course points out the basic rule: “Every ingredient of which the offense is

composed must be accurately and clearly alleged in the indictment''.

Now, in *United States vs. Cohen*, 124 Fed. (2d) 164, Judge Augustus Hand writing the case. In that case the defendants were indicted under two counts, one for knowingly concealing and facilitating the concealment and so forth, of three grains of morphine knowing it was imported contrary to law and, second, for knowingly concealing and transporting and facilitating the concealment and transportation under 21 U.S.C.A. 174. There the question of the sufficiency of the indictment arose.

The Court: What case is that? I am still reading the Crank case.

Mr. Strong: I am sorry. It is *United States vs. Cohen* in which the court ruled on the sufficiency of the indictment and held that the allegations there made it a sufficient indictment.

The Court: Where is that?

Mr. Strong: That is *U. S. v. Cohen*, 124 Fed. (2d), 164.

As I say in none of these cases does the question arise in the way it would give a direct decision because nobody leaves those words out, because they are in the statute and they are required. Everybody inserts them. [57]

The Court: Let me ask you this question as to Count One. Could a person innocently receive, conceal and facilitate the transportation and concealment after importation of a narcotic drug if they knew that it had been imported at that time contrary to law?

Mr. Strong: That presume one thing which doesn't even have to be proved. All you have to show is a person has it. Now, they put a presumption on a resumption. They presume that he knew it was illegally imported if it is shown that he has it and then it is going to be presumed from the fact that he had it that he couldn't have done it innocently. That is a double presumption.

Mr. Baugh: If you Honor please, counsel has not answered your question.

The Court: I know he hasn't.

Mr. Strong: May I finish. I think a person can innocently receive a thing. He can get it from somebody. Somebody can hand it to him without his knowing what it is or that he even has the drug.

The Court: But this alleges that he had the drug and that he knew then and there when he did receive it that it had been imported into the United States contrary to law. Isn't that alleging knowledge?

Mr. Strong: That is alleging knowledge as to its being imported as required by the statute. [58]

The Court: But if he knew when he received it that it had been imported contrary to law isn't that alleging knowledge? The only authority that there seems to be on it directly is the Crank case and it is the statement to which you directed my attention on page 22 where it says:

"In order to secure a conviction under Count Four it was necessary that there should be

proof, one, that the accused had knowingly received”

and so forth

“and, two, that it had been unlawfully imported and, three, that appellant knew that it had been unlawfully imported”.

But the court was not there considering that phase of the indictment and consequently this statement as to item 1 in that paragraph in parenthesis, must be regarded as dicta because the court doesn't pass directly on it. It passes on the other portion in the remaining discussion of that case.

Mr. Strong: I think that even dicta, however, of course carries weight with your Honor in interpreting the statute.

The Court: Yes.

Mr. Strong: And it is the Ninth Circuit.

The Court: The trouble with dicta is that when the [59] lower court follows dicta and it gets to the upper court they say: “Well, how many times must we tell these judges in the lower court that the authority of our decision only extends to the things actually decided.”

Mr. Strong: Well, as I say, that is our position.

The Court: Do you have anything additional to offer?

Mr. Jones: No.

Mr. Strong: As to Count One.

The Court: All right. Now as to Count Two I cannot see how that can be good at all because a person can do everything that is said or alleged in

that count and still be innocent of any crime. Do you have anything more to offer?

Mr. Strong: Not on those two, your Honor.

The Court: Do you?

Mr. Baugh: No, if your Honor please, I have nothing further.

The Court: This will be the ruling of the court and I believe it is the first ruling on this point.

I am satisfied that Mr. Baugh's analysis of Section 174 is the correct analysis. I think if I were drawing the indictment, however, I would have put in "did knowingly, unlawfully, willfully, feloniously, illegally" and so on and so forth "received," but it isn't here. Consequently it is up to the court to decide at this point as to whether or not this indictment charges a crime within the framework [60] of this Statute.

I think that the words "fraudulently and knowingly imports or brings any narcotic drug into the United States" applies to the first clause—that is to say the act of importing or bringing or assisting in so doing and that the Statute defines another offense when it says "or receives, conceals, buys, sells or in any manner facilitate the transportation, concealment or sale of any narcotic drug after being imported or brought into the United States knowing the same to have been imported contrary to law."

I think that the knowledge there applies to the knowledge that it was imported contrary to law and that if a person receives it and the indictment alleges that at the time and place that they did receive, con-

ceal and facilitate the transportation and so forth they did know it had been imported into the United States contrary to law.

Moreover my conclusion in this respect is fortified by the last sentence in section 174, because it says:

“Whenever on trial for a violation of this Section the defendant is shown to have or have had possession of the narcotic drug such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.” Now, this charges that he did receive it, conceal it [61] and so forth. So, if he received it and concealed it he must have possessed it and that depends on whether or not the evidence at the trial bears that out. But all I am dealing with now is the language of this indictment.

So, the objection to the introduction of any evidence as to Count One——

Mr. Strong: May I say just one thing before your Honor rules on it?

The Court: I gave you a number of chances to speak. I am ruling now.

Mr. Strong: But you brought up another point.

The Court: It says:

“Whenever on the trial,”

and I pointed out that that may not show on the trial but the indictment says that he did receive it and conceal it. Now, the receiving and so forth implies possession, so on the face of this indictment I am saying that this does charge a crime because

of that presumption which is contained in the Statute which merely fortifies the conclusion I reached concerning the first clause.

I was simply citing that by way of illustration.

Mr. Strong: All I was going to say is that the same presumption relates to importing which is the first part of the Statute.

The Court: The objection to the introduction of any [62] evidence on Count One on the ground that Count One does not state an offense is overruled.

As to Count Two I am satisfied, as I have indicated that everything that is alleged in this count could have been done by the defendants and still not have violated the law.

I think that they could knowingly purchase a narcotic drug which was not from an original stamped package and still do it legally and lawfully and for that reason I do not think it states an offense and the objection to the introduction of any evidence as to Count Two is sustained.

Now, as to Count Three——

Mr. Strong: May we argue on that, your Honor?

The Court: As to Count Three—I have asked you several times if you had anything more to say. I am ruling now.

Mr. Strong: I am talking about Count One and Two.

The Court: No. As to Count Three I indicated at the commencement of the session this morning that I thought that Count Three stated an offense—that an offense could be carved out of it. However,

after re-examining it during the course of the argument and re-examining the Statute I think that I was in error.

It was my impression that the charge here of a conspiracy knowingly to import and bring into the United [63] States of America and to aid and procure the importing and bringing into the United States of America from the Republic of Mexico approximately 227 grains of heroin in violation of the United States Code, Title 21, Section 174, would state an offense, even though the words beginning on line 11: "And to receive, conceal and facilitate the transportation and concealment of," might not do so because here this conspiracy charge, assuming that I am correct as to Count One, does not contain the necessary element which is in Count One—that is to receive, conceal and facilitate the transportation and concealment after importation knowing it to have been imported contrary to law.

So, that part of it doesn't state an offense. However, upon re-examination of the Statute I find that it says it is wrong to import and bring into the United States and so on and so forth, contrary to law.

Now, where does it say that here? It doesn't say it. All it says is——

Mr. Baugh: May I be heard? I didn't know whether you asked the question or not. That is what I mean by asking if I may be heard.

Mr. Strong: The arguments are closed.

The Court: I think the arguments are closed.

Mr. Baugh: I didn't mean to argue. I just wanted to ascertain if the court asked me a question. [64]

The Court: I remember Earl Rogers took 15 minutes to apologize to a jury one time because he interrupted the other counsel.

Mr. Baugh: May I explain myself? I didn't know whether that was an oratorical or genuine question propounded to me.

The Court: Well, I don't know what it was. It certainly wasn't intended to be oratorical. It was intended to be explanatory of the ruling that I am about to make.

Now, I do not think that you can charge an offense by saying that somebody did something in violation of such and such a section of the Code unless you also allege the things they did knowingly, to import and bring into the United States and to aid and procure such bringing into the United States contrary to law.

Now, where is that element supplied? I can't see it.

I might hear a little further argument from both counsel on that.

Mr. Baugh: Shall I be heard first, your Honor?

The Court: Yes.

Mr. Baugh: It seems to me that the expression "contrary to law" is synonymous with the expression "contrary to a particular law."

The Court: Title 21, Section 174—excuse me for interrupting you, doesn't prescribe the illegal method of [65] importing. The tariff laws relate to

the matter of importing. There is a legal way of importing opium and there is an illegal way. Section 174 does not prescribe the illegal way and it seems to me that unless you can explain it the words "contrary to law" mean contrary to the provisions of the Statute which permit the lawful importation of opium or heroin or whatever it is we are dealing with. [66]

Mr. Baugh: Title 21, Section 174, provides that if any person fraudulently or knowingly imports it contrary to law he is guilty of an offense.

The Court: That is right.

Mr. Baugh: This says that the plan was to import it in violation of this Section 174 which describes that which is unlawful. So it would seem to me, if the court please, by the rule—not the rule but it is synonymous to say—contrary to law or contrary to this section which describes the law broadly.

The Court: Why then did Congress put the words in there "contrary to law" in this section?

Mr. Baugh: Well, it is my judgment, if the court please, that they did that in order to make that section adequately broad and totally comprehensive, whereas here the pleader has simply limited himself more than is necessary but has included enough to make it the equivalent of contrary to law for all practical intents and purposes. That at least would be my view.

The Court: I do not think so, counsel. The objection to the introduction of any evidence under

Count 3 is sustained. We will call the jury down and go to trial on Count 1.

Mr. Strong: At this time may we move for a judgment of acquittal as to Count 2 and Count 3?

The Court: No, you may not—let me see. You have had a witness sworn and a question asked?

Mr. Strong: Yes, your Honor.

The Court: What is your position on that, Mr. Baugh?

Mr. Baugh: Well, if your Honor please, if the court feels as the court has ruled I am unable to cogently argue that the motion is not well taken.

The Court: Very well. Each of the defendants will have a judgment of acquittal on the grounds stated by the court as to Count 2 and Count 3.

Call the jury down and proceed to trial as to Count 1.

(The jury returned to the courtroom at 10:30 o'clock a.m.)

The Court: The record will show that the jury is present, each one of them in his or her place; the defendants are present in person and by counsel.

Ladies and gentlemen of the jury, since the commencement of the trial, for reasons of law with which you need not be concerned, Count 2, which charged that on or about September 23, 1948, the defendants, naming each of them, did knowingly purchase a narcotic drug, approximately 227 grains of heroin which was not from the original stamped package, has been disposed of by a judgment of acquittal by the court on legal grounds.

Likewise Count 3, which charged the conspiracy heretofore [68] delineated to you, has been disposed of by a similar judgment, likewise on legal grounds.

We therefore will proceed to trial on Count 1 of the indictment, which charges that on or about September 23, 1948, in Los Angeles County, within the Central Division of the Southern District of California, defendants Shafer, Winfrey and Spelmon did receive, conceal and facilitate the transportation and concealment, after importation, of a certain narcotic drug, namely, approximately 227 grains of heroin, which said heroin, as the defendants then and there well knew, had been imported into the United States contrary to law. [69]

[Endorsed]: No. 12245. United States Court of Appeals for the Ninth Circuit. Milton Theodore Shafer, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 21, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeal
for the Ninth Circuit

No. 12245

MILTON THEODORE SHAFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S DESIGNATION OF
PORTIONS OF RECORD TO BE PRINTED

Pursuant to Rule 19 of the United States Court of Appeal for the Ninth Circuit, Appellant above named, herewith designates for printing by the Clerk of the United States Circuit Court of Appeal, all of the record on file in the above-entitled action material to the consideration of such an appeal by said Court, the following:

1. Indictment.
2. Appeal of Appellant Shafer.
3. Minute Order of Court dated December 29, 1948, sustaining the objections to the introduction of evidence on Counts Two and Three and granting the motion for judgment of acquittal as to Appellant under Counts Two and Three.
4. Verdict.
5. Motion for a new trial.
6. Minute Order of Court denying the motion for a new trial.

7. Notice of Appeal.

8. The following portions of the reporter's transcript, to wit: ([*] Page 17, line 5, to page 23, line 23; page 28, line 1, to page 30, line 25; page 33, line 1, to page 41, line 11; page 46, line 1, to page 69, line 12.

9. Concurrently filed herewith Appellant specifies the points that will be urged on the appeal prosecuted in this matter.

MAX TENDLER,
Attorney for Appellant.

[Endorsed]: Filed May 27, 1949.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATED POINTS
ON APPEAL

Appellant hereby specifies the following enumerated points to be argued at length in the brief, as containing the errors relied on, on this appeal.

1. Count One of the indictment does not state facts sufficient to constitute an offense against the laws of the United States.

2. That the verdict of the jury in this matter is in all particulars inconsistent and illegal.

3. That Appellant was placed in jeopardy as to Count One of the indictment for the reason that

* Page numbering appearing at bottom of page of original certified Transcript of Record.

said Count One does not contain an element that is not involved in Counts Two and Three of said indictment, and for that reason the verdict in this case amounts to double jeopardy.

4. That the concert of action implied in Count Three of the indictment is the same concert of action implied in Count One and Appellant's acquittal under Count Three entitled him to an acquittal under Count One; and the Court was in error in denying Appellant's motion for a new trial, and motion for judgment notwithstanding the verdict.

5. The narcotic alleged in Counts Two and Three being the same narcotic alleged in Count One, judgment of acquittal under Counts Two and Three is, in its legal effect, an acquittal of appellant from knowingly and fraudulently receiving, concealing, having in his possession, purchasing, and facilitating the transportation and concealment after importation of the said narcotic contrary to law.

/s/ MAX TENDLER,

Attorney for Appellant.

No. 12245

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON THEODORE SHAFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

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WILLIAM P. DUNFORD

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No. 12245

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON THEODORE SHAFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

*To the Honorable United States Court of Appeals for
the Ninth Circuit:*

This is an appeal from the District Court of the United States in and for the Southern District of California, Central Division, on a conviction of the appellant and a judgment of the Court thereon, under Count One of a three count indictment.

Jurisdiction.

Appellant was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on three counts. The first count charged a violation of United States Code, Title 21, Section 174 [T. R. p. 2]; the second count charged a violation of United States Code, Title 26, Section 2553(a); and in the third count a conspiracy to commit the offenses alleged in Counts One and Two [T. R. p. 3].

Statement of the Case.

After the first witness of the government was sworn and a question asked [T. R. pp. 6 and 54], the appellant attacked the sufficiency of the indictment by a motion to dismiss [T. R. pp. 5 and 6]. At the conclusion of the arguments on said motion, the Court overruled the objection to introduction of evidence on Count One and sustained the objection to the introduction of evidence on Counts Two and Three [T. R. p. 6]. (Attention is called to the fact that the Court did not dismiss Counts Two and Three, but merely forbade any evidence in proof of the material allegations thereof [Rep. Tr. pp. 50 and 53].)

Thereupon on appellant's motion for judgment of acquittal as to Counts Two and Three, the Court granted said motion [T. R. p. 6]. Then followed judgments of acquittals as to Counts Two and Three [T. R. p. 54]. The trial was had under Count One, resulting in appellant and a co-defendant being convicted under Count One, with an acquittal as to a third co-defendant [T. R. p. 7]. A motion for a new trial [T. R. p. 8] was filed by appellant and was denied [T. R. p. 14], and a motion for *non-obstante verdicto* was also denied [T. R. p. 15]. Thereafter due notice of appeal was filed from the judgment on April 13, 1949 [T. R. pp. 16 and 17].

This appeal is based upon appellant's five designated points on appeal [T. R. p. 57].

ARGUMENT.

Point I.

“Count One of the Indictment Does Not State Facts Sufficient to Constitute an Offense Against the Laws of the United States.” [T. R. p. 57.]

The statute under which appellant suffered conviction read as follows:

“If any person, *fraudulently or knowingly*, imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in doing so, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale, of any such narcotic drug after being imported or brought in, knowing the same to have been brought in contrary to law, etc.” (Title 21, Sec. 174, U. S. C.) (Italics ours.)

The author of the indictment did not charge all of the acts prohibited by the section, but only the receipt, concealment and facilitating the transportation after importation of a certain drug * * * as the defendant then and there well knew had been imported into the United States contrary to law.

Such acts as the statute denounces shall be done “*fraudulently and knowingly*.” Such acts that are here charged against appellant were not done “*fraudulently and knowingly*,” for the reason that the count in question does not so charge.

It is axiomatic in criminal pleading that a criminal *scienter* shall be made to appear in the evidence if the

offense sought to be charged is not one "*malum per se*." In this case the criminal *scienter* is found in the words of the statute, "fraudulently and knowingly," and their omission is fatal to the count.

"The words 'wilfully,' 'maliciously,' 'wilfully and maliciously,' or 'knowingly and wilfully,' etc., must be stated when they constitute part of the statutory definition of the offense."

Am. Jur. Vol. 29, page 629, Sec. 67 (and cases cited).

The general rule on this proposition has been very succinctly stated in *Corpus Juris Secundum*, as follows:

"As stated in *Corpus Juris*, which has been quoted and cited with approval, an indictment for an offense created by statute must be framed on the statute, and this fact must distinctly appear on the face of the indictment itself, and in order that it shall so appear, the pleader must either charge the offense in the language of the act, or specifically set forth the facts constituting the same. The general rule is that the charge shall be so laid in the indictment or information as to bring the case precisely within the statute, alleging distinctly all the material facts and circumstances necessary to constitute the essential requisites of the offense."

Corpus Juris Sec. Vol. 42, Sec. 137, page 1032.

Referring to pages 21 and 22 of the Transcript of Record, we find appellant's position adequately stated.

"Directing Your Honor's attention to Count One of the indictment, Your Honor will see that it is laid under Title 21, Section 174.

Title 21, Section 174, is predicated partly upon Title 21, Section 173. Title 21, Section 174, says

that if any person fraudulently or knowingly imports or brings into the United States—the indictment fails to set forth in any place in count 1 that any of these acts' was done fraudulently or knowingly by either of the defendants.

The Court: Count 1 does. Count 1 is in several alternatives: 'If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory, or assists in so doing, or receives, conceals, buys, sells or in any matter facilitates the transportation, concealment or sale—'

Mr. Strong: It is our position the word 'fraudulently' or 'knowingly' applies to all of the alternatives.

The Court: That is correct. They have charged here that they did receive, conceal and facilitate the transportation after importation, and the last line says, 'The defendants well knew it had been imported into the United States of America contrary to law.

Those two are separate requirements of knowledge and the first requirement—

The Court: In other words, your position is they must knowingly conceal it.

Mr. Strong: They must fraudulently or knowingly receive, conceal or facilitate the transportation of it.

The Court: And the second is that they must know it was imported contrary to law.

Mr. Strong: Yes. And the statute itself in certain instances eliminates the knowledge as to the second part, in certain instances, by a presumption which is written into 174 but that only goes to the second part, as to the knowledge of it having been imported contrary to law.

But the offense that is actually charged here has to be alleged in the terms of the statute of having

been committed fraudulently or knowingly, the actual act, which is the offense of concealing.”

The foregoing reference embodies the complaint of this appellant. On pages 48 *et seq.* of the Transcript will be found the ruling that held contrary to appellant’s position. Counsel desires to point out in passing the language of the trial court on this score. The Court said:

“I think if I were drawing the indictment, however, I would have put in ‘did knowingly, unlawfully, willfully, feloniously, illegally’ and so on and so forth ‘received,’ but it isn’t here.” [T. R. p. 48.]

It has been held as a rule of construction that:

“Criminal statutes must be strictly construed.”

Tanner v. United States, 128 F. 2d 970.

Alluding to the descriptive words which the trial court stated he would have inserted if he were drawing the indictment, we cite the following:

“Allegations of essential elements of statutory offense are matters of substance and not of form, and their omission is not aided by verdict.”

Harris v. U. S., 104 F. 2d 41,

and

“Where guilty knowledge is a substantive ingredient of the offense it must be alleged.”

United States v. Buzzo, 85 U. S. 18, 21 L. Ed. 812.

In view of the above authorities, the “knowledge” of the defendant that he was receiving contraband, for whatever purpose, is a substantial and an essential ingredient of the offense and if one is accused of the offense under consideration without a sufficient allegation that he

possessed himself of the "drug" "knowingly" or "fraudulently," as the statute directs, the omission of such allegation is fatal. The courts have consistently held that even considering the indictment as a whole, or in all of its parts, cannot suffice to supply the needed language.

"The rule that all parts of an indictment should be taken into consideration, and that indictment should be reasonably construed, does not warrant court in supplying needed language which is essential to a necessary element of the offense."

Mitchell v. U. S., 118 F. 2d 653.

Referring again to the language of the court on page 22, the expression, "The defendant well knew it had been imported into the United States contrary to law," omits the full reading of the matter.

In the language of Count 1 [Tr. p. 2], the expression "then and there" is included, making the full statement read:

"The defendants then and there well knew, had been imported, etc."

We are thus faced with the situation where the trial court seeks to supply statutory elements (guilty *scienter*) to a count where such elements or ingredients are missing. The following is in point:

"Where the charging part of an indictment for murder is in one sentence and the word 'feloniously,' used in relation to the assault, is so connected with the subsequent portion of the sentence as to modify them by a fair and reasonable interpretation, it is not necessary to repeat the word 'feloniously' in connection with each act necessary to constitute the crime, but if the pleader uses words to describe the

intent with which the mortal wound was inflicted, other than those used to charge the intent with which the assault was made, the words 'then and there' used in connecting the inflicting of the mortal wound with the felonious intent, will be interpreted to refer to time and place merely, and not as a vehicle to convey the intent with which the assault was made through the indictment so as to modify the intent in making the mortal wound."

Wright v. U. S., 90 Pac. 732, 18 Okla. 510, 11 Am. Cases, 994.

In line with reasoning set out in the *Wright* case (*supra*), the following authority from the Ninth Circuit is especially helpful:

In *Pon Wing Quong v. U. S.* (111 F. 2d 751 at 755), the point is there discussed. In the *Pon Wing Quong* case it was distinctly charged that the defendants "fraudulently and knowingly" did facilitate, etc. In the case at bar there is no direct *scienter* charged, as the statute directs, and the use of the expression "then and there well knew" cannot be relied on to supply the necessary *scienter*. In other words, the expression "then and there well knew," merely brings forward prior averments of date and venue, and do not otherwise enlarge the description of the offense.

Pon Wing Quong v. U. S., 111 F. 2d 751.

See also:

Shaw v. U. S., 165 Fed. 174.

It was indicated in the *Pon Wing Quong* case that there is no question but that in some instances this phrase would be held as a recital and not a sufficient allegation of fact, and that in the facts of the *Pon Wing Quong* case such an expression as alluded to did not so apply. However, in the case at bar we cite the *Pon Wing Quong* case as an authority in sustaining appellant's contention with regard to the allegations in Count 1 of the indictment. A further quotation from that case will be helpful:

“The second count fails to allege directly any knowledge on the part of said defendants * * * that said opium had been imported into the United States contrary to law.”

claiming that the phrase “as said defendants then and there well knew” is but a mere recital. There is no question but that in some instances this phrase would be held as a recital and not a sufficient allegation of fact, but we hold that this does not obtain in our case. The applicable part of the count is as follows:

“That at the time and place mentioned in the first count, in Second Division and District, said defendants fraudulently and *knowingly* did facilitate the transportation of said load of smoking opium, in quantity particularly described as ‘250 cans containing approximately 165 ounces of smoking opium,’ and said smoking opium had been imported into the United States contrary to law, *as said defendants then and there well knew.*” (Italics of the Court.)

Appellant's complaint is as much directed toward the reasoning of the trial court in sustaining the count as in the inherent weakness of the count itself [T. R. p. 48]. The following is noted from the record:

"I think that the knowledge there applies to the knowledge that it was imported contrary to law, and if a person receives it and the indictment alleges that at the time and place they did receive, conceal and facilitate the transportation, and so forth, they did know it had been imported into the United States contrary to law." [T. R. pp. 48 and 49.]

The Court then adopts the concluding verbiage of the law to fabricate the receipt of the drug as fraught with the presumption of guilty knowledge. Note the further language of the Court:

"Moreover, my conclusion in this respect is fortified by the last sentence in Section 174, because it says:

'Whenever on trial for a violation of this Section, the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.'

Now, this charges that he did receive it, conceal it, and so forth. So if he received it and concealed it he must have possessed it and that depends on whether or not the evidence at the trial bears that out. But all I am dealing with now is the language of this indictment."

There can be no doubt that the Court was influenced in ruling the count good by the presumption of unlawful possession expressed in the concluding paragraph of the section. It is appellant's contention that the Court was in error in so ruling. The language, "Whenever on trial for a violation of this Section, etc.," very plainly has nothing whatever to do with the indictment under which the trial occurred. The trial mentioned wherein defendants' possession of the "drug" is presumed unlawful is an event having a previous valid indictment to warrant such a trial. The Court in passing on the validity of Count 1 gave to the latter paragraph an importance in interpreting the section that was plainly erroneous. Nowhere does the Court make plain the validity of the count with its omitted statutory terminology, save in the following language:

"*The Court:* It says:

'Whenever on trial,' and I pointed out that may now show on the trial, but the indictment says that he did receive it and conceal it. Now, the receiving, and so forth, implies possession, so on the face of this indictment I am saying that this does not charge a crime because of that presumption. I am saying that this does charge a crime *because of that presumption*, which is contained in the statute, which merely fortifies the conclusion I urged concerning the first count." [T. R. pp. 49-50.]

From the foregoing it cannot be gainsaid but that the Court held Count 1 valid because of the "presumption" of

illegality attaching to appellant's possession of the "drug." The "presumption" alluded to does not come into existence except in a trial upon a valid indictment. It can play no part in construing the allegations of an accusatory instrument, yet the record shows that the trial court seized on that presumption and forced appellant to his trial for that reason alone, on a count that was fatally defective. In all cases, as we have pointed out, where an indictment is framed upon a statute, making a course of conduct a crime, the Supreme Court of the United States has very clearly held what the law is with respect to such an indictment.

"We have no disposition to qualify what has been already frequently decided by this Court, that where a crime is a statutory one it must be charged with *precision and certainty*, and every ingredient of which it is composed must be *clearly and accurately* set forth, and that even in the case of misdemeanors the indictment must be free from all ambiguity and leave no doubt in the mind of the accused and the court of the exact offense intended to be charged."

Ledbetter v. U. S., 170 U. S. 606, 42 L. Ed. 1162
(and cases cited).

Point II.

That the Verdict of the Jury in This Matter Is in All Particulars Inconsistent and Illegal.

The argument that here follows will relate to Points 3, 4 and 5 of appellant's designated points on appeal [T. R. pp. 57-58].

As indicated in the record at page 6, the Court granted judgments of acquittal on Counts 2 and 3. The jury considered only Count 1 and found appellant and his co-defendant guilty thereunder [T. R. pp. 9-10].

We wish to point out that the Trial Court could have adopted one of different courses in disposing of appellant's attack on the indictment. It could have sustained the motion as made to suppress the evidence in support of Counts 2 and 3 and withdrew said counts from the consideration of the jury, or as an alternative, it could have granted the motion as made and dismissed the offending counts as not stating a public offense. Again, it could have limited the proof to the allegations of Count 1 without dismissing or otherwise bothering with Counts 2 and 3. The following incident from the record plainly indicates that the Court did not take any of the procedural steps set out above, but granted appellant a judgment of acquittal as to Counts 2 and 3. The record is here quoted:

“Mr. Strong: At this point, your Honor, the defendant Shafer moves for the suppression of all evidence in the case, on the ground that the indictment does not state a public offense. We would like to argue the matter before your Honor.

The Court: You object to the introduction of any further evidence?

Mr. Strong: That is right.

The Court: What is it, a motion to suppress evidence or an objection to the introduction of further evidence?

Mr. Strong: An objection to the introduction of other evidence and also a motion for dismissal on the ground that the indictment does not state a public offense." [T. R. p. 20.]

As the record will indicate, an extended argument ensued, and on page 54 the action of the Trial Court with respect to the motions as made appears:

"Mr. Strong: At this time may we move for a judgment of acquittal as to Counts 2 and 3?

The Court: No, you may not—let me see. You have had a witness sworn and a question asked?

Mr. Strong: Yes, your Honor.

The Court: What is your position on that, Mr. Baugh?

Mr. Baugh: Well, if your Honor please, if the Court feels as the Court has ruled, I am unable to cogently argue that the motion is not well taken.

The Court: Very well. Each of the defendants will have a judgment of acquittal on the ground stated by the court as to Counts 2 and 3." [Tr. p. 54.]

It is appellant's contention that as soon as the Court below directed an acquittal on Counts 2 and 3, the appellant was in jeopardy as to Count 1 and his conviction thereunder and his sentence were without the powers of the Trial Court to impose. Conspiracy is a separate offense from the substantive offense for which it was

formed to commit. Proof of a conspiracy lies in the proof of the overt acts done or brought about to further the object of the criminal enterprise, and when a defendant is adjudged acquitted of overt acts that in themselves constitute the substantive offense of which he was found guilty, there is an inconsistency in the verdict and it should not be allowed to stand.

Count 3 of the indictment sets out [T. R. p. 4] the objects of the conspiracy, in that appellant was to deliver to one Fred Dauge the sum of \$500.00, and said Dauge was to secure certain narcotic drugs in Mexico and transport the same to Los Angeles, California, and deliver the same to defendant, Milton Shafer. To effect the object of the conspiracy five overt acts are alleged, and in the overt acts we have the essential elements set out in Count 1 of the indictment, to wit: overt act No. 4 alleges that Fred Dauge delivered to Milton Shafer a key to a locker in the Union Station at Los Angeles, California, it elsewhere being charged that that was the method whereby the narcotic was to be concealed and its importation facilitated. As a matter of fact, we will quote from the language of Count 3 [T. R. p. 3]:

“Prior to the commencement of the first overt act herein set forth and continuing to and including the date of the indictment, defendants Milton Theodore Shafer, Thomas Winfrey and Fred Earl Spelman did agree, confederate, and conspire, within the Central Division of the Southern District of California, to commit offenses against the United States, as follows: Knowingly to import and bring into the United States of America, and to aid and procure the importing and bringing into the United States of America from the Republic of Mexico, and to receive, conceal and facilitate the transportation and the con-

cealment after importation, of approximately 227 grains of heroin, in violation of United States Code Title 21, Section 174.” [T. R. pp. 3 and 4.]

There we have Section 174 distinctly charged in the manner of its congressional enactment.

Had the Trial Court emasculated all the evidence attaching to the conspiracy count, there could have been no evidence whatsoever left to prove the elements of the crime set out in Count 1. Therefore, it is an inevitable conclusion, and under this state of the record appellant is entitled to a reversal of his conviction, and to his discharge in the premises, because it would be a fallacy to say that if he was not guilty of conspiring to commit the offense in Count 3, it would have been physically possible for him to have done the acts necessary to bring about his conviction under Count 1. If the appellant did not furnish \$500.00 to witness Dauge to purchase narcotics in Mexico, then to that extent he did not receive any narcotics as charged in Count 1. Yet it is the same 227 grains of heroin that is mentioned in both counts.

The fact that supports appellant in this situation seems to be a complete ignoring of the effect of the acquittal rendered by the Court before the reception of evidence touching on the material allegations of Count 1 in the indictment.

An acquittal in legal parlance is a judicial determination of the fact of innocence. It is not a mere dismissal or other disposition of the matter. What brings the conviction of the defendant in this case under criticism is a

violation of that rule of law which forbids double jeopardy, and of course double jeopardy can be argued as an inconsistent verdict. Nevertheless, a case in point is as follows:

“Congress has the power to create separate and distinct offenses growing out of the same act, but whenever it appears that the proof of one offense proves every essential element of another growing out of the same act, the Fifth Amendment limits the punishment to a single act.”

Freeman v. U. S., 146 F. 2d 978.

A defendant cannot be acquitted under one count and convicted under another involving the same facts. This renders the verdict inconsistent. If the opinion of the *Freeman* case just cited is examined, its similarity to the case at bar is very apparent. Joint action was involved in that case, as here. Also, the same persons acting jointly in the substantive offenses were likewise accused in the commission of the overt acts of the conspiracy count. A similar situation governs the record before us. Count 3 of the indictment alleges that the concert of action was between Shafer, Winfrey and Spelman. It does not allege that such “concert of action” existed between these named and others unknown to the grand jury.

Counsel contends that as soon as the Court below directed an acquittal of Counts 2 and 3, the appellant was in jeopardy as to Count 1, and his conviction thereunder and his sentence were without the powers of the Trial Court to impose.

The better way to approach the problem confronting us in this matter is to state that since the evidence used was directed toward a joint action on the part of the defendants, such joint action cannot be used in a dual capacity, one to prove the substantive offense and the other to prove the conspiracy. The courts have consistently held that where such occur and convictions result, the argument of double punishment is made and is generally sustained. Count 2 of the indictment charges the purchase of the narcotics mentioned in the other counts. As to this count defendant Shafer was acquitted by the Court, and the effect of that acquittal like the acquittal in Count 3, was a judicial determination of the fact of innocence, and if this situation is given any merit whatever, counsel need but point to the fact of the indictment itself to establish the fact appellant was cleared of any unlawful purchase of the narcotic involved, and he likewise was cleared of any "concert of action" in regard to Counts 1 and 2.

The following authorities will sustain the appellant in his contention. The case of *Krench v. U. S.*, 42 F. 2d 354 (Note) (Referring to *United States v. Reynolds*, 282 Fed. 256):

"That although it is competent for Congress to create separate and distinct offenses growing out of the same transaction, where it is necessary in proving one offense to prove every essential element of another growing out of the same act, a conviction of the former is a bar to a prosecution for the latter."

Also, in the case of *Tritico v. U. S.*, 4 F. 2d 664, on the question of jeopardy, cites with approval *Morey v. Commonwealth* (108 Mass. 433), in which it was said:

“A conviction or acquittal upon one indictment is no bar to a subsequent conviction, and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. *The test is not whether the defendant had already been tried for the same act, but whether he has been put in jeopardy for the same offense.* A single act may be an offense against two statutes, and if one statute requires proving an additional fact which the other does not, an acquittal or conviction does not exempt defendant from prosecution and punishment under the other.”

Applying the principle from the decision just cited, it is readily seen that this appellant in securing his acquittal as to Count 2 and Count 3, was acquitted thereof and thereby of each and every fact necessary to prove the violation of the offense delineated in Count 1. The same drug is involved and the same defendants are implicated. There is no one fact requiring proof under Count 1 that would be at all foreign to the proof of either Count 2 or Count 3, and as a consequence, appellant's conviction not only amounted to an inconsistent verdict, but one that was in violation of his constitutional rights not to be placed in jeopardy twice for the same offense.

The principle that has been argued at length finds ample support throughout the decisions, and it cannot be attacked

simply because the inconsistency of the verdict or the jeopardy occurred in the same action. At this point we cite the case of *Burton v. U. S.* (202 U. S. 344, 50 L. Ed. 1057):

“If the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact, quoting with approval in Bishop’s Criminal Law that: ‘The jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both.’ ”

And it was also held in *In re Nielson* (131 U. S. 176, 33 L. Ed. 118), holding in effect the same and stating also that it makes no difference if the prosecution is held at the same or different time.

“It can make no difference whether separate charges are tried together or at different times.”

Counsel is not unmindful of the fact that the argument here made can be attacked upon the ground that it was the defendant’s fault that invoked the action of the Court in pronouncing the judgment of acquittal. It will be conceded that under certain circumstances a defendant cannot be allowed to take advantage of his own conduct. As an example, he will be prevented from pleading former jeopardy upon a successful determination of an appeal prosecuted by him from a conviction. We pointed out in the inception of the argument here that the defendant merely moved to suppress the evidence upon all counts under the indictment for the reason that the indictment did not state facts sufficient to constitute a violation of the law.

It was possible for the Court in its position as the sole judge of the law, to have ruled as we have pointed out in instances other than the manner disclosed. Because the Court so ruled cannot be laid at the door of the appellant. This situation was illustrated in the case of *United States v. Kraut* (2d Fed. Supp. 16), wherein the Court touched upon a situation similar to the one at hand and held:

“In the instant case, however, the withdrawal of the eight counts from the consideration of the jury at the second trial can hardly be claimed to be actuated by any necessity, urgent or otherwise. In the language of the presiding judge, it was done * * * purely as a matter of expediency.

From that point of view there may have been ample justification for the action of the court, but the fact that there was such justification from such a point of view is not adequate to countervail the plea of former jeopardy subsequently made by counsel for defendant.”

We feel, therefore, that the reasoning in the *Kraut* case above set out enables this appellant to state that the judgments of acquittal contained in this record are not at par with mere judgments of dismissal or mere motions to suppress the evidence, but it was jeopardy in its broadest legal sense, and the Court in granting the judgments of acquittal before the receipt of the entire evidence, was erroneous, and amounted to not only former jeopardy, but double jeopardy.

In the case of *Louis v. U. S.* (218 Fed. 36), a plea of former jeopardy was not allowed due to additional charge of "aiding and abetting," not involved in former trial of conspiracy. Aiding and abetting a crime is a distinct offense under act of Congress. And also:

"In determining whether same offense is charged in two counts of an indictment or in two indictments consolidated for trial, so that acquittal on one offense will bar a conviction on the other, test is whether the same evidence will support both counts."

Hughes v. U. S., 95 F. 2d 538.

Also:

Schmeller v. U. S., 143 F. 2d 544.

To properly test the validity of the acquittals contained in this record, and omitting any reference to the validity or invalidity of Count 1, but assuming for the sake of argument that a retrial will be ordered under that count, the question then would arise, can the defendant be placed on his trial with respect to Counts 2 and 3, if the judgments of acquittal are not sufficient determinations of innocence as to bar future prosecutions? It is well known that a defendant can be retried upon a count that is merely dismissed, for under such a situation the defendant is not placed in jeopardy. We are not contending for such a record here. So, therefore, if the defendant cannot be placed on trial in the future for the offenses enumerated in Counts 2 and 3, then his innocence therein and thereunder has been determined, and in that fact lies the merit of his contention upon this appeal that he was placed in jeopardy as to Count 1.

Point III.

That Appellant Was Placed in Jeopardy as to Count I of the Indictment for the Reason That Said Count One Does Not Contain an Element That Is Not Involved in Counts Two and Three of Said Indictment, and for That Reason the Verdict in This Case Amounts to Double Jeopardy.

As has heretofore been stated, the argument set out in Point II of this brief relates to this Point, and for the sake of brevity, is reiterated and repeated in full as to this Point III with the same force and effect as though fully set out herein.

Point IV.

That the Concert of Action Implied in Count Three of the Indictment Is the Same Concert of Action Implied in Count One and Appellant's Acquittal Under Count Three Entitled Him to an Acquittal Under Count One, and the Court Was in Error in Denying Appellant's Motion for a New Trial, and Motion for Judgment Notwithstanding the Verdict.

As has heretofore been stated the argument set out in Point II of this brief relates to this point, and for the sake of brevity, is reiterated and repeated in full as to this Point IV with the same force and effect as though fully set out herein.

Point V.

The Narcotic Alleged in Counts Two and Three Being the Same Narcotic Alleged in Count One, Judgment of Acquittal Under Counts Two and Three Is, in Its Legal Effect, an Acquittal of Appellant From Knowingly and Fraudulently Receiving, Concealing, Having in His Possession, Purchasing, and Facilitating the Transportation and Concealment After Importation of the Said Narcotic Contrary to Law.

As has heretofore been stated, the argument set out in Point II of this brief relates to this point, and for the sake of brevity, is reiterated and repeated in full as to this Point V with the same force and effect as though fully set out herein.

It is therefore respectfully urged that the conviction of the appellant be reversed, and he be ordered discharged.

MAX TENDLER,

*Attorney for Defendant and Appellant,
Milton Theodore Shafer.*

No. 12245.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON THEODORE SHAFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON THEODORE SHAFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

The United States District Court for the Southern District of California had jurisdiction of appellant and the subject matter. This court has jurisdiction of the appeal.

The offense charged was triable by the District Court under authority of Title 21, United States Code, Section 174, wherein the offense was defined, and of Title 28, United States Code, Section 41, Subdivision 2, which confers jurisdiction to try the case upon the District Court. This Court has jurisdiction of the appeal under the provisions of Title 28, United States Code, Section 225(a) and (d), which treat of the jurisdiction of Courts of Appeal.

Statement of Case.

On November 17, 1948, appellant [there were two other defendants] was indicted by the Grand Jury for the Southern District of California. The Indictment was in three counts.

Count One charges a violation of Title 21, United States Code, Section 174, commonly referred to as the Jones-Miller Act. [T. R. 2-3.]

Count Two charges a violation of Title 26, United States Code, Section 2553(a), commonly referred to as the Harrison Narcotic Act. [T. R. 3.]

Count Three charges a conspiracy, under Title 18, United States Code, Sections 2 and 371, to commit the substantive offense charged in Count One. [T. R. 3-5.]

After the first witness for the Government was sworn and a question asked appellant objected to the introduction of any evidence and moved a dismissal on the ground that the indictment did not state a public offense. [R. T. 17.] After argument [R. T. 18-60], the Court overruled the objection as to Count One and sustained the objection as to Count Two [R. T. 60-63.] After further argument [R. T. 63-67], the Court sustained the objection to Count Three. [R. T. 67.]

Thereupon, that is to say after the Court had ruled that Counts Two and Three failed to state a public offense, appellant moved for a judgment of acquittal as to Counts Two and Three. [R. T. 67.] This motion the

Court granted “on the grounds stated by the Court” [R. T. 68], *i.e.*, that Counts Two and Three failed to state a public offense.

The trial then proceeded as to Count One and resulted in the conviction of appellant and a co-defendant and an acquittal of a third co-defendant. [T. R. 7-8.] Judgment was filed April 11, 1949.

A motion for a new trial was filed by appellant on January 17, 1949 [T. R. 8-13] and the same was denied by the Court on April 11, 1949 [T. R. 14-16] at which time appellant’s motion for *non obstante verdicto* was also denied. [T. R. 15.]

On April 14, 1949, appellant filed his notice of appeal. [T. R. 16-17.]

ARGUMENT.

POINT I.

Count One of the Indictment States a Public Offense.

Rule 7 of the Rules of Criminal Procedure for the District Courts of the United States describes the nature and contents of an indictment and provides in subdivision (c) thereof, in so far as is here pertinent, that:

“The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged * * *.”

An indictment, following Form No. 1 in the appendix to the Rules, charging that the murder was committed “with premeditation” but omitting to charge that it was committed “with malice aforethought,” as provided in the statutory definition of murder [18 U. S. C. 452], was approved by this Court on April 5, 1948.

United States v. Carlos Romero Ochoa, 167 F. 2d 341.

“A plain, concise and definite written statement of the essential facts constituting the offense charged” in the instant case is contained in Count One. It alleges that “on or about September 23, 1948, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Milton Theodore Shafer [appellant], Thomas Winfrey, and Fred Earl Spelmon did receive, conceal, and facilitate the transportation and concealment, after importation, of a certain narcotic drug, namely: approximately 227 grains of heroin, which said heroin, as the defendants then and there well knew, had been imported into the United States of America contrary to law.” [T. R. 2-3.]

Paraphrasing Count One, it is alleged that appellant did receive, conceal, and facilitate the transportation and concealment, after importation, of heroin which, as the *appellant then and there well knew, had been imported into the United States contrary to law.*

It is appellee's position that the words italicized above constitute precisely the scienter described in the statute, Title 21, United States Code, Section 174. This statute, according to our interpretation and in so far as is here pertinent, divides itself into two parts. To make our position clear we quote the statute verbatim but leave a space at the point where we feel the statute divides itself, to wit:

"If any person *fraudulently or knowingly* imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing,

or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, *knowing the same to have been imported contrary to law, * * *.*" (Italics added.)

42 Stat. 596.

The italicized "fraudulently or knowingly" in the first division above modifies importations "contrary to law" in said first division of the statute. It defines the scienter that makes importation unlawful.

The italicized “knowing the same to have been imported contrary to law” in the second division above modifies the phrase “any such narcotic drug after being imported or brought in” appearing in said second division of the statute. It defines the scienter that makes the receiving, concealing, buying or selling unlawful.

Count One of the indictment in the instant case was based on the second division of the statute. In consequence the “fraudulently or knowingly” of the first division modifying importations “contrary to law” was inappropriate and would have been redundant had it been charged in the indictment.

It is submitted that Count One contained a plain, concise and definite statement of all essential facts constituting the offense charged. The requisite scienter with respect to “knowingly” was charged in the allegation that appellant “knew” the heroin which he allegedly received, concealed, etc., “had been imported into the United States of America contrary to law.” [T. R. 2-3.]

The requisite guilty knowledge was alleged.

POINT II.

There Was No Double Jeopardy.

Points II, III, IV and V of Appellant's Opening Brief are here treated collectively.

There was no inconsistency or illegality in the verdict. It would be of no consequence if there were inconsistency.

Dunn v. United States (1932), 284 U. S. 390, 393.

Appellant's Points II, III, IV and V, in legal contemplation, are all one, to wit, "double jeopardy." However, this claim cannot be made intelligently and in good faith by appellant. This is true for the reason that appellant urged upon the trial court, and prevailed upon the trial court to hold, that Counts Two and Three failed to state a public offense. Thereafter appellant moved the trial court for judgment of acquittal as to Counts Two and Three which the court also granted but on the ground that those counts of the indictment failed to state a public offense. [R. T. 63-68.]

A judgment of acquittal on a count or counts which fail to allege or charge any offense is surely and clearly no determination of the issues contained in a count properly charging a public offense. In truth a judgment of acquittal under a count which does not charge an offense is a judgment of acquittal of nothing.

Looking through form to substance in this case and denominating the ruling of the court by any terminology, one discovers that the issues under Counts Two and Three of the indictment were not submitted to the jury and those counts were in effect dismissed by the Trial Court on the ground that they failed to state a public offense.

For appellant to seriously and intelligently claim double jeopardy on this appeal even on the ground that Counts Two and Three were decided on the merits by a judgment of acquittal, it would require that appellant here urge upon this court that Counts Two and Three did state a public offense in complete reversal of appellant's position in the Trial Court. Appellant is estopped to adopt here what he successfully rejected in the Court below.

This Court has recently held, with respect to the issues here that

“* * * a dismissal of one count, where the indictment charges the same offense in two counts, even after all the evidence is in, does not operate as a bar to a subsequent indictment for the same offense. *Craig v. United States*, 81 Fed. (2d) 816, 819, cert. den. 298 U. S. 690, rehearing den. 299 U. S. 620; *O'Malley v. United States*, 128 Fed. (2d) 676, 684 (Cir. 8); *cf. Dunn v. United States*, 284 U. S. 390, 393. In the *Craig* case an earlier trial had resulted in the discharge of the jury for failure to agree after the defendant had successfully moved for a dismissal of one of two counts charging the same offense. On a second trial for the same offense, the defendant's plea of former jeopardy was overruled by the trial court, and this court affirmed. Assuming that the same offense is charged in both counts of the indictment in the instant case, if a second trial would not be barred, *a fortiori*, a submission of the first count to the jury in the same trial would not violate appellant's right not to be placed twice in jeopardy for the same offense.”

Barsock v. United States, Case No. 12,013, decided August 12, 1949.

Conclusion.

It is respectfully submitted that Count One of the indictment charges an offense against the laws of the United States; that appellant was not placed in double jeopardy; that the record abounds in substantial and adequate evidence of appellant's guilt under Count One and that it is free from error.

Respectfully submitted,

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ERNEST A. TOLIN,
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MILTON THEODORE SHAFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

MAX TENDLER,
220 Broadway Temple Building, Los Angeles 12,
*Attorney for Defendant and Appellant
Milton Theodore Shafer.*

FILED

SEP 1 1949

PAUL P. O'BRIEN, -

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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No. 12245.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON THEODORE SHAFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

POINT I.

Count One of the Indictment Does Not State a Public Offense.

Appellee, on page 6 of his brief, attempts to state that the guilty scienter need not be charged as an essential element of the offense, due to the closing phraseology of the second division of the Statute, namely, "contrary to law." It is claimed that "fraudulently or knowingly" if alleged would have been redundant, and that "contrary to law, sufficiently charges guilty scienter."

The framework of many Statutes having subdivisions begins with the words: "any person who shall fraudu-

lently or knowingly” do certain things set out *in seriatum* and it is of course not required to repeat the expression “fraudulently or knowingly” when defining each act contained in the Statute. It would, however, be required of the pleader to allege such scienter if the prosecution was based upon a violation of one of the enumerated subsections of the Statute. This is the case at hand.

As pointed out, the trial court in a measure agreed with appellant at the time the matter was under consideration, as follows:

“I think, if I were drawing the indictment, however, I would have put in ‘did knowingly, unlawfully, willfully, feloniously, illegally’ and so on and so forth ‘received,’ but it isn’t there.” [T. R. p. 48.]

We have cited the Supreme Court as directly bearing on this point, and again cite the language used:

“Where guilty knowledge is a substantive ingredient of the offense it must be alleged.” (*United States v. Buzzo*, 85 U. S. 18, 21 L. Ed. 812.)

and again,

“The rule that all parts of an indictment should be taken into consideration, and that indictment should be reasonably construed, does not warrant court in supplying needed language which is essential to a necessary element of the offense.” (*Mitchell v. U. S.*, 118 F. 2d 653.)

POINT II.

There Was Double Jeopardy.

In Point II of appellee's brief the request of appellant for release in the premises is argued at length that the action of the trial court amounted to nothing more than a withdrawal of said count from the consideration of the jury and that there is no jeopardy attached.

Appellant does claim, and again asserts that since the trial court elected to direct acquittals of the offending counts instead of merely withdrawing them from a consideration by the jury, it was an acquittal of the counts in every legal sense of the word. To acquit one of an offense is greatly different from merely withholding the same from a consideration by the jury.

Appellant in his brief stressed the fact that the granting of the acquittals was not a request but "an objection to the introduction of other evidence, and also a motion for dismissal on the ground that the indictment does not state a public offense." [T. R. p. 20.]

It is seen from the incident as the same occurred at the trial that the acquittance herein resulted from the action of the trial court who, as pointed out in appellant's brief, could have acted in any one of three ways, but chose to grant appellant an acquittal, and as we have stated, the same concert of action in relation to every essential fact upon which this appellant stands convicted was contained as necessary elements in Counts II and III.

If jeopardy attaches in this instance, regardless of the fact that the charges were made or tried together, or at different times, appellant respectfully urges that his conviction be reversed, and for reasons stated in his briefs may be discharged in the premises.

Respectfully submitted,

MAX TENDLER,

*Attorney for Defendant and Appellant
Milton Theodore Shafer.*

No. 12245

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

MILTON THEODORE SHAFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

MAX TENDLER,
220 Broadway Temple Building, Los Angeles 12,
Attorney for Defendant and Appellant.

FILED

FEB 11 1950

PAUL P. O'BRIEN,

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No. 12245

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON THEODORE SHAFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

To the Honorable United States Court of Appeals for the Ninth Circuit:

Petition of the defendant Appellant for a rehearing of the Appeal herein is based on the following grounds:

1. Misapplication of the principles of *Hagner v. United States*, 285 U. S. 427, 433, and *Kalos v. United States*, 9 F. 2d 268 at 270. A consideration of these cases would indicate that knowledge by the defendant when he is alleged to have received the narcotic described in Section 174 of United States Code, Title 21, is an essential element of the crime made so by that section and this Court is at variance with that opinion in holding that the words "fraudulently or knowingly" are not connected with the crime of receiving, facilitating and concealing of the narcotic described in the statute, Section 174.

2. The decision is not clear how the statute divided itself into a second clause to which the words "fraudulently or knowingly" are not connected.

POINT I.

The elements of the crimes created by Section 174 are:

1. The crime of fraudulently or knowingly importing or bringing any narcotic drug into the United States contrary to law.

2. The crime of assisting another person in fraudulently or knowingly importing or bringing any narcotic drug into the United States contrary to law.

3. The crime of fraudulently or knowingly receiving or concealing or buying or selling or in any manner facilitating the transportation, concealment or sale of any *such* (italics ours) narcotic drug after being imported or brought in, *knowing the same* (italics ours) to have been imported contrary to law. The italicized words "*the same*" and "*such*" refer back to the same narcotic drug specifically described and classified in the first part of the sentence of Section 174, to-wit: "fraudulently or knowingly imports or brings any narcotic drug into the United States." Those words refer not to just any narcotic drug imported contrary to law but they refer specifically to any narcotic drug which was fraudulently and knowingly brought in contrary to law. Such words make the first portion of the first sentence of Section 174 a part of the elements of the crimes which relate to receiving or concealing or facilitating; by such reference Congress, in creating crimes which relate to receiving, concealing or facilitating, made the necessary elements as follows:

A. A narcotic drug which had fraudulently or knowingly been imported into the United States contrary to law, B. and knowingly received such narcotic drug which

has been fraudulently and knowingly imported into the United States contrary to law, C. knowing that such fraudulently or knowingly imported narcotic drug had been imported contrary to law; had Congress intended that the mere receipt of any narcotic drug which had been imported contrary to law would be the only elements of crime created by it, it would have said receiving any narcotic drug and not any *such* narcotic drug. The scienter is not limited to knowing that a narcotic drug was imported contrary to law; the scienter is the knowledge by the defendant when he receives a narcotic drug as in *Kalos v. United States*, 9 F. 2d 268 at 270, which holds at page 270 in Note 3, "On the other point, that defendant knew when the package was handed to him it concealed morphine which had been unlawfully imported, we feel the prosecution failed to make a case for the jury. Knowledge by defendant that morphine was in the package is an element of the crime, made so by statute," and knowing that it was a narcotic drug which had been fraudulently or knowingly imported contrary to law.

The cited case, *United States v. Amaroso*, in the opinion of the Honorable Court does not have before it the problem as presented in the instant case. And even if the cited case is authority for the rule that under an indictment the Court would be required to charge not only that the exact knowledge specified in the statute must be found, but also to charge that a definite criminal intent existed before conviction could ensue. The element of the exact knowledge specified in the statute as set forth in the rule is not disposed of by the cited cases in their opinion nor by this Honorable Court's opinion.

POINT II.

The grammatical construction urged in the opinion would indicate that adverbs do not modify all the verbs that follow them in *seriatim*. Such construction would of necessity require a repetition of the adverb to modify every verb which follows it to effectively modify each of such verbs. The ordinary drafting of statutes, informations and indictments never require such a repetition and it has been customarily accepted as a matter of grammatical construction that the one adverb preceding a series of verbs modify each of such verbs.

The decision creates a doubt as to whether the Court finds that the indictment states a sufficient crime because a jury would have to be charged with the exact knowledge specified in the statute and that a definite criminal intent existed; and that from a guilty verdict by the jury a fatally defective indictment would be cured. The decision, in the light of the foregoing, is not clear how the defendant could be in no doubt as to the crime charged in the Count.

Respectfully submitted,

MAX TENDLER,

Attorney for Defendant and Appellant.

The foregoing Petition is believed to be well founded in the points of law and has not been filed for the purpose of delay.

MAX TENDLER,
Attorney for Defendant and Appellant.

No .12247

United States
Court of Appeals
For the Ninth Circuit.

FRED ELIA IOB, SAMUEL M. DOBBS and
WALDEMAR F. ULLRICH,

Appellants,

vs.

LOS ANGELES BREWING CO., INC., et al.,
Appellees.

Transcript of Record

Upon Appeal from the United States District Court
for the Southern District of California
Central Division

FILED

AUG 31 1949

PAUL P. O'BRIEN,

CLERK

No .12247

United States
Court of Appeals

For the Ninth Circuit.

FRED ELIA IOB, SAMUEL M. DOBBS and
WALDEMAR F. ULLRICH,
Appellants,

vs.

LOS ANGELES BREWING CO., INC., et al.,
Appellees.

Transcript of Record

Upon Appeal from the United States District Court
for the Southern District of California
Central Division

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O'MELVENY & MYERS,
433 S. Spring St.,
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For Appellee Joint Local Executive Board of California, an unincorporated association:

P. H. McCARTHY, JR.,
518 Balboa Bldg., 593 Market St.,
San Francisco 5, Calif. [*1]

* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 6322-Y Civil

FRED ELIA IOB, SAMUEL M. DOBBS and
WALDEMAR F. ULLRICH,

Petitioners,

vs.

LOS ANGELES BREWING COMPANY, INC.,
a corporation,

Respondent.

PETITION FOR ENFORCEMENT OF
VETERAN'S REEMPLOYMENT RIGHTS

The petitioners above named respectfully allege:

I.

This petition is filed under the provisions of Section 8(e) of the Selective Training and Service Act of 1940, as amended (50 U.S.C.A. App. Sec. 308(e)), and Section 7 of the Service Extension Act of 1941 (50 U.S.C.A. App. Sec. 357); and jurisdiction of the Court is based thereon.

II.

The respondent corporation is engaged in the brewing business, and operates and maintains a brewery at Los Angeles, California, within the jurisdiction of this Court.

III.

Respondent employed petitioner Fred E. Iob as

a brewer, and the other petitioners as bottlers, in positions other than temporary, in the operation of said brewery, for several years before, and up to the times of their respective [2] departures for military service. During 1942 and 1945, the petitioners left such positions in the employ of respondent in order to enter upon active duty, or to perform training and service pursuant to the requirements of the Selective Training and Service Act of 1940, in the United States Army. They were promptly inducted and entered upon active duty in said army, and served therein thereafter until each had satisfactorily completed his period of training and service, and received a certificate thereof, and was honorably discharged from said army. Within 90 days after being so discharged, each petitioner, during the year 1945 or 1946, applied for reemployment by the respondent, while qualified to perform the duties of his former position in its employ, and was duly reemployed by the respondent in his former position, as required by law.

IV.

On or about October 5, 1946, and within one year after being so reemployed, each petitioner, other than Petitioner Fred E. Iob, was discharged from his said position by the respondent, without cause; and the respondent has ever since that date declined and refused to employ such petitioners, in their former positions, or in any other positions. By reason of such unlawful discharge, without cause, each petitioner has suffered a loss of wages since Octo-

ber 5, 1946, at the rate and in the sum stated in Paragraph VI below, and will continue to suffer a loss of wages in future at the same weekly rate until restored to employment by the respondent.

V.

Petitioner Fred E. Iob has been twice discharged without cause from his said position since the date of his reemployment, and within one year thereafter. He was reemployed September 9, 1946, and was first discharged without cause on September 17, 1946. Representatives of the Selective Service System induced the respondent to place him back in employment, which it did on November 6, 1946, and again discharged him without cause on November 25, 1946. Since the latter date, the respondent has continued to decline and refuse to employ him in his former position, or in any other position. By reason of such unlawful discharges, petitioner Fred E. Iob has suffered a loss of wages at the rate of \$103.00 per week [3] from September 17, 1946, to November 6, 1946; and at the same rate from November 25, 1946, to date; and he will continue to suffer a loss of wages in future at the same rate until restored to employment by the respondent.

VI.

The statistical facts concerning each individual petitioners' employment, reemployment and discharge by the respondent, and of his service in the U. S. Army are as follows:

	Samuel M. Dobbs	Waldemar F. Ullrich	Fred E. Iob
Position held	Bottler	Bottler	Brewer
Date first employed by the respondent..	July, 1937	Feb., 1937	Mar. 8, 1943
Date of termination to enter U. S. Army	Jan. 1, 1942	May 6, 1942	Feb. 24, 1945
Date of entry on active duty in U. S. Army	Jan. 9, 1942	May 9, 1942	Mar. 9, 1945
Date of discharge therefrom	Nov. 30, 1945	Feb. 8, 1946	July 20, 1946
Date of reemploy- ment	Jan. 2, 1946	Apr. 29, 1946	(1) Sept. 9, 1946 (2) Nov. 6, 1946
Hourly wage rate	\$1.365	\$1.365	
Weekly wage rate.....	\$95.00	\$95.55	\$103.00
Date of discharge without cause	Oct. 5, 1946	Oct. 5, 1946	(1) Sept. 17, 1946 (2) Nov. 25, 1946
Weekly loss of wages so caused	\$ 95.50	\$ 95.55	\$ 103.00
Loss of wages to date..	\$955.50	\$955.50	\$1,030.00
Weekly rate of future loss	\$ 95.55	\$ 95.55	\$ 103.00

VII.

A common question of law and fact is involved in the individual complaints of the petitioners in that, as they understand, the reason for their said discharge was that they were not members of a certain new union, which, after about July 15, 1946, the respondent began insisting that they join, or belong to, as a condition of their continued employment in respondent's service for the period of their statutory reemployment.

VIII.

In addition to the loss of wages, each petitioner

has suffered a loss in seniority in respondent's employ, because of such discharge.

Wherefore Petitioners Respectfully Pray:

(a) That the Court adjudge and decree that the petitioners were entitled to be reemployed in their former positions in the respondent's employ at the times of their applications therefor, and not to be discharged from such positions without cause for one year from the dates of their respective reemployment; and that the respondent's action in discharging them within such year was unlawful.

(b) That the respondent be ordered, directed and specifically required (1) To reemploy and restore each petitioner to his former position in its employ, without any loss of seniority due to absence in military service, or due to the unlawful discharges above mentioned; (2) To retain each petitioner in such employ without discharge unless for cause, for the portion of the reemployment year of each that remained unexpired when the petitioners were discharged; and (3) To compensate each petitioner for his loss of wages suffered by reason of such unlawful discharge, until he is so restored.

(c) That a preliminary injunction issue requiring the respondent to restore the petitioner pending the trial of this case; and that, at the hearing such injunction be made permanent for the balance of the reemployment year aforesaid.

(d) That petitioners recover of respondent the fees and costs of the United States herein, for its benefit. [5]

(e) That petitioners have all such other and further relief as may be just and proper in the premises, and that they have general relief.

JAMES M. CARTER,
United States Attorney.

RONALD WALKER,
Assistant U. S. Attorney,
Chief of Civil Division.

By /s/ JAMES C. R. McCALL, JR.,
Assistant U. S. Attorney,
Attorneys for Petitioner.

State of California,
County of Los Angeles—ss.

Fred Elia Iob, makes oath that the statements made in the foregoing Petition as of his own knowledge are true, that those made on information and belief, he believes to be true, and that the entire Petition is true to the best of his knowledge, information and belief.

/s/ FRED ELIA IOB,
Petitioner.

Subscribed and sworn to before me this 6th day of Jan., 1947.

EDMUND L. SMITH,
Clerk, United States District Court, Southern District of California.

[Seal] /s/ THEODORE HOCKE,
Deputy. [7]

State of California,
County of Los Angeles—ss.

Samuel M. Dobbs, makes oath that the statements made in the foregoing Petition as of his own knowledge are true, that those made on information and belief, he believes to be true, and that the entire Petition is true to the best of his knowledge, information and belief.

/s/ SAMUEL M. DOBBS,
Petitioner.

Subscribed and sworn to before me this 11th day
of January, 1947.

[Seal] /s/ DANTE SPINOGLIO,
Notary Public.

My Commission Expires June 20, 1949. [8]

State of California,
County of Los Angeles—ss.

Waldemar F. Ulrich makes oath that the statements made in the foregoing Petition as of his own knowledge are true, that those made on information and belief, he believes to be true, and that the entire Petition is true to the best of his knowledge, information and belief.

/s/ WALDEMAR F. ULLRICH,
Petitioner.

Subscribed and sworn to before me this 6th day of January, 1947.

EDMUND L. SMITH,
Clerk, United States District Court, Southern District of California.

[Seal] /s/ EDW. F. DREW,
Deputy.

Complaint Amended May 28, 1947.

[Endorsed]: Filed Jan. 23, 1947. [9]

[Title of District Court and Cause.]

ANSWER OF RESPONDENT LOS ANGELES
BREWING CO., TO PETITIONER'S PETITION

Comes Now the respondent, Los Angeles Brewing Co., and for answer to Petition herein admits, denies, and alleges as follows:

I.

Respondent admits the allegations of paragraph II of said Petition, and in connection therewith does further allege that it does ship malt beverage products, as well as alcoholic beverages and wines, to various adjacent states and territories, and does in addition purchase various materials, goods, wares, and merchandise without the State of California, which said materials goods, wares, and merchandise are shipped to the respondent with in the State of

California and products of respondent are shipped out of the said State of California.

II.

Answering paragraph III of the within Petition, respondent admits each and every allegation therein contained, [10] save and except respondent denies that each petitioner was reemployed by reason of any requirement of law, and in connection therewith does allege that said petitioners, or each of them, were reemployed without reference to any requirement of law, and that each of them were referred to respondent by the particular labor union with which the petitioners were then affiliated and were cleared for reemployment by said labor unions, and did reenter respondent's employment in the year 1946 after the honorable discharge of each petitioner from the United States armed services.

III.

Answering paragraph IV of the within petition, respondent denies generally and specifically each and every allegation therein contained, and the whole thereof.

Further answering said paragraph IV, respondent alleges that the said named petitioners, to wit, Samuel M. Dobbs and Waldemar F. Ullrich, did on or about September 21, 1946, of their own volition voluntarily terminate their employment by and with the respondent, and that said named petitioners have not thereafter applied for re-entrance to respondent's employment.

IV.

Answering paragraph V of the within petition, respondent denies generally and specifically each and every allegation therein contained, except so much thereof as may be construed to allege that since November 25, 1946, respondent has declined and refused to accept as an employee said Fred E. Iob by reason of said petitioner's refusal to comply with the terms and conditions of that certain Agreement, a copy of which is attached hereto, made a part hereof, and marked Exhibit "A," particularly Section 1(a) thereof.

Further answering said paragraph V, respondent alleges that it did make and enter into a certain collective bargaining agreement (said Exhibit "A") governing wages, rates of pay, hours of labor, and other conditions of employment on the 27th day of [11] July, 1946, with the Joint Local Executive Board of California, a labor union, under and pursuant to the provisions of 49 U. S. Stats. 452, 29 U.S.C.A., 151, Section 1, et seq., which said Agreement has been in full force and effect from July 27, 1946, and still continues in effect in accordance with the terms thereof.

Further answering said paragraph V of the within petition, respondent is informed and believes, and upon such information and belief alleges, that said petitioner Fred E. Iob has on more than one occasion prior to said September 9, 1946, and November 25, 1946, been offered by the representative of said Joint Local Executive Board of California, and

Local Union No. 893 of said Joint Local Executive Board of California, the opportunity of joining and becoming a member of said Local Union No. 893.

V.

Answering paragraph VI of the within petition, respondent denies generally and specifically each and every allegation therein contained, except as hereafter alleged, and respondent alleges that the statistical facts concerning each individual petitioners' employment are as follows:

	Samuel M. Dobbs	Waldemar F. Ulrich	Fred E. Iob
Position held	Bottler	Bottler	Brewer
Date first entered employment	July 29, 1937	Feb., 1937	Mar. 8, 1943
Date of termination to enter U. S. Armed forces	Jan. 17, 1942	May 9, 1942	Feb. 24, 1945
Date of entry on active duty in U.S. Armed forces	Jan. 9, 1942	May 9, 1942	Mar. 9, 1945
Date of discharge therefrom	Nov. 30, 1945	Feb. 8, 1946	July 20, 1946
Date of reentry into respondent's em- ployment	Jan. 2, 1946	Apr. 29, 1946	(1) Sept. 9, 1946
Hourly Wage Rate Respondent's (Exhibit "A")	\$1.36	\$1.36	\$1.48
Weekly Wage Rate (Respondent's Exhibit "A")	\$54.50	\$54.50	\$59.00
Termination of Employment	Sept. 21, 1946	Sept. 21, 1946	(1) Sept. 17, 1946 (2) Nov. 25, 1946
Weekly loss of wages so caused	None	None	None
Loss of wages to date..	None	None	None
Weekly rate of future loss	None	None	None

VI.

Answering paragraph VII of the within petition, respondent denies each and every all and singular the allegations therein contained, except so much of said paragraph as may be construed to allege that respondent insisted that it could only conduct its business and have in its employ in the departments covered by Exhibit "A" those persons who had complied with the provisions of said Exhibit "A."

VII.

Answering paragraph VIII of the within petition, respondent denies each and every all and singular the allegations therein contained, except insofar as Exhibit "A" may provide for a system or practice of seniority.

Wherefore, respondent respectfully prays that petitioners take nothing by their petition and that the same be dismissed, and that respondent have judgment for its costs of suit herein incurred.

HANNA AND MORTON and
JAMES M. McROBERTS.

By /s/ JAMES M. McROBERTS,
Attorneys for Respondent.

EXHIBIT "A"

CONTRACT

Between Joint Local Executive Board of California Comprising Bottlers Local Union No. 896, Brewers, Maltsters & Yeast Workers Local Union No. 893,

Brewery Shipping; Receiving Clerks and Checkers Local Union No. 884; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 203, Affiliated with International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, Effective July 28, 1946.

AGREEMENT

Whereas, the Joint Local Executive Board of California, Locals Nos. 893, 203, 896, and 884 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, state and allege that as of the date hereof, said joint Local Executive Board of California is the designated and selected representative of the employees in the brewing, bottling, delivery, shipping and receiving departments of all the breweries of Southern California, for the purposes of collective bargaining with respect to rates of pay, wages, hours of labor and other conditions of employment, which said specific statement and allegation constitutes the material consideration to the breweries herein.

Now, Therefore, after presentation of evidence of such representation and in consideration of the mutual promises herein contained: it is agreed:

Section 1. (a) Only members in good standing who are members of Local Union No. 893 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America shall be employed as brewers in the brewing department, in-

cluding all basements, platforms and wash houses used in connection with the operating of the brewing department.

(b) Only members in good standing who are members of Bottlers' Local Union No. 896 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America shall be employed as bottlers in the bottling department at the brewery, including all basements, platforms, storage, and yards used in connection [14] with the operation of the bottling department in positions where bottlers are now employed, or in those branches where employer may require the employment of a steady crew to perform bottlers' work.

(c) Only members in good standing, who are members of Local Union No. 203 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America shall be employed as shipping drivers and helpers, special delivery drivers and helpers, bottle route drivers and helpers, keg beer drivers and helpers, within jurisdiction of Local 203.

(d) Only members in good standing who are members of Local Union No. 884 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America shall be employed, wherever now employed as checkers and shipping clerks in the shipping departments and receiving departments conducted at brewery premises, or in any warehouses adjacent thereto.

(e) Brewmasters and assistant brewmasters, and

foremen who perform no manual labor and employees in managerial capacity of any kind or nature shall not be covered by any term or provision of this contract, and may be employed regardless of Union membership.

(f) This agreement shall cover only employees who perform their services principally within the State of California for the respective breweries.

(g) Provided, however, in those cases in which the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America permit mixed branches, i.e., branches in which members who normally would belong to Local Unions Nos. 893, 896, 884 and 203 but are members [15] of a mixed branch of any of the said local unions, only members in good standing who are members of such mixed branch of any of said local unions shall be employed in the capacities hereinabove set out; and provided, further, that all unloading and loading of railroad cars on or within two blocks of the brewery premises shall be done by members of one of the aforesaid local unions or branches thereof.

Section 2. All employees shall be obtained and hired through the respective locals and branches thereof to which the employees in said department are required to belong; provided, however, that should said respective locals be unable to provide satisfactory employees, then and in that event, said employees may be obtained from any source; and provided further, however, that said employees so obtained through other sources shall be required,

before commencing work, to apply for a permit card from the respective locals to which the employees in said department belong.

Section 3. No employee shall be discharged or discriminated against for upholding union principles, nor may any employee be discriminated against or discharged who engages in any work for and under the instructions of said Local Union 893, 203, 896 and 884, or any of the branches of same, or either or all of them, and said employees shall be permitted to take such time as may be necessary to discharge these duties, or any of them; provided, however, that said employee shall be paid no compensation whatsoever by the employer for said time devoted to the performance of said duties, or any of them. Members of the respective branches shall not be permitted to handle or bottle any products of any brewery or any malt house that is declared "unfair" by the [16] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, it being understood that goods on hand or in transit are excepted.

Section 4. (a) Sickness shall be no cause for discharge, and any employee who shall cease work because of sickness, provided that such sickness does not last longer than six (6) months, and also provided that said employee is capable of performing his usual duties, shall be upon recovery entitled to and receive his former position. The employer shall have the right to call in temporary help to

discharge the duties of an employee who is on the sick or injured list. Upon the return of such regular employee, employer shall be entitled to discharge such temporary employee as may have been fulfilling the duties of said sick or injured employee regardless of the duration of such sickness or injury. Injuries received through accident in performance of duties shall be no cause for discharge, and an employee injured through accident shall be entitled to his former position upon recovery, irrespective of the period of time elapsing between injury and recovery, provided said employee be capable of performing his usual duties.

(b) In the case of any employee inducted into the land or naval forces of the United States of America for training and service under the Selective Training and Service Act of 1940, if such person shall have left his position, other than a temporary position, in order to perform such training and service, and shall have received the certificate prescribed by said Act, and if he is still qualified to perform the duties of such position and makes application for employment within sixty (60) days after he is relieved from such training and service, the employer shall restore such person [17] to such position or to a position of like seniority, status and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Any person restored to a position in accordance herewith shall be considered as having been on furlough or leave of absence during his pe-

riod of training and service in the land or naval forces and when so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause one year after such restoration. Upon the re-instatement of any such person to his position, employer shall be permitted to discharge such employee as such returned service man shall displace.

Section 5. (a) The employer shall install all legally required safety appliances and first aid materials to insure employees against danger to health, life, and limb, and shall furnish a sanitary wash-room and dressing room with lockers, or the equivalent thereof:

(b) The employees of bottling departments shall be furnished, free of charge, the use of a rubber suit and boots for the purpose of cleaning the shops and equipment, and the employees of brewing departments shall be furnished the use of rubber suits when cleaning tanks with caustic soda.

(c) All things being equal, union made materials and machinery shall be given preference.

Section 7. Union labels of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen [18] and Helpers of America, shall be supplied to all breweries that comply with this agreement.

Section 8. Only one controlling owner, controlling shareholder, or bona fide partner shall perform any of the work in any of the departments covered by this contract. Nothing, however, in this agreement shall be considered as interfering with the rights of any foreman or supervisor performing work not covered by this contract, or to look after machinery, or assist at short intervals whenever a man is needed; provided, however, that immediate application is made to the proper local union for a man to fill such vacancy and do such work.

Section 9. No employee shall have his wages reduced or his hours of labor increased by reason of the signing of this agreement. Any commission paid is not to be considered wages.

Section 10. (a) All work done in addition to the regular hours of daily work shall be considered and paid for as overtime. Overtime must be paid for and shall not be taken out nor balanced by lay-off.

(b) All overtime, Sunday and holiday work shall be paid for at the rate of time and one-half, it being understood that a work day or shift starting on a straight pay basis shall be completed as such.

(c) The minimum weekly wages specified hereinafter are for a full week's work, as herein provided, and it is definitely understood that on days on which no work is performed for any reason, including holidays, an employee shall receive no compensation whatsoever.

Section 11. Differences that may arise as to the

interpretation of this contract shall be referred [19] to a Board of Arbitration, consisting of two members of the Union and two representatives of the employer firm; said Board shall meet within two weeks from the time that a demand for arbitration has been made. Should these four fail to agree, they shall, together elect a fifth disinterested party. The decision of the majority of the whole shall be final and binding upon both parties.

There shall be no stoppage of work, either on the part of the employer or the employees, pending said settlement of said dispute as hereinabove provided, and providing further, that said work shall continue in the manner in which it had previous to the arising of the dispute, and that such work shall be performed, or such payments made as had been done or paid previous to the arising of the dispute, it being the considered and deliberate intention of the union and the employers to avoid in so far as possible the stoppage of the work.

Section 12. There shall be no apprentices or learners in any department except the brewing, malting and syrup departments.

Section 13. Employees discharged for embezzling employer's money or property shall be dropped from the membership roll of the union to which they belong, after having had a fair trial by said union and having been found guilty. Pilfering of cases or inducing bottlers or loaders to give drivers extra bottles shall be regarded as embezzlement and dealt with as above set out. The furnishing of a surety

bond against embezzlement shall be left to the discretion of the employer; provided, however, that said employer shall be required to pay the premium on said bond, and provided further, that said bond shall be in no [20] way construed as affecting said employee's obligation to said employee's union.

Section 14. In the event that an employee from whom a surety bond shall be required by the employer cannot provide a Five Hundred Dollar (\$500.00) cash bond, or cannot obtain from or qualify with a representative and regularly established surety company doing business in California the requisite surety bond, the employer may, at his option, refuse to accept such person as an employee.

Section 15. Any literature distributed by an employee of the brewery without the consent of the brewery will give the brewery the right to discharge immediately any such employee, provided that such literature is distributed during working hours.

Any employee who makes any derogatory remarks which shall be proven against him, about employer, its products or officers, shall, at the option of the employer, be immediately discharged.

Section 16. The employer shall have the right to discharge any employee who has, to the conviction of the employer, failed to perform his duty satisfactorily. Such unsatisfactory employee shall be spoken to by the employer. At the same time the shop delegate of the union shall be notified of the

employee's offense, and at the second offense such employee may be discharged without further notice.

Section 17. This contract shall be subject to such conditions as may be included in any federal or state legislation passed in the future.

Section 18. Any and all customers or their employees, or agents of employer's products, or [21] public carriers, shall have the right to call at employer's platform to receive their orders, and the same shall be delivered to them subject to present conditions relative to distributors.

Section 19. The employer shall, at its option, have the privilege of loading or unloading all trucks with brewers, bottlers, or drivers.

Section 20. The employer firms shall at all times have the entire right of selection and placing of men or the rearrangement of employees, regardless of seniority.

Section 21. Nothing in this contract shall be considered as interfering with the rights of any foreman or supervisor to perform work not covered by this contract, or in cases of emergency, to look after machinery or assist at short intervals.

Section 22. No employees shall be removed by the union from their place of employment to perform work in another place of employment without first obtaining the permission of the employer; provided that temporary employees may be removed upon the conclusion of the regular work week, upon notice to said employer.

Section 23. All employees, upon completion of forty-five (45) weeks of continuous employment for the same employer within a twelve months consecutive period shall be entitled to one week's vacation with full pay. Employees shall be allowed not in excess of sixty (60) calendar days on account of illness or accident during said twelve months period, and the same shall not constitute a violation of the provisions of this paragraph. Provided, however, that said vacation period shall be taken at a time to be set by the employer, and provided further, that employer shall in no event be required to replace employees on vacation. [22]

Each such employee after five (5) consecutive years of continuous employment with the same employer shall during continuous service thereafter with such employer be entitled to two (2) weeks' vacation with pay at the end of any forty-five (45) weeks worked within any consecutive twenty-four (24) months. An employee shall become entitled to his vacation in no period short of fifty-two (52) weeks and no time of employment worked in excess of forty-five (45) weeks in any consecutive fifty-two weeks of employment can be carried over as a credit to the next vacation.

Forty (40) working hours or more worked in any one week for the same employer shall constitute a week's work when computing total weeks worked and eligibility of employee to a vacation. Vacations shall be taken at a time stipulated by the employer who shall not be required to employ additional help to replace employees on vacation.

These employees receive no bonus other than some employers pay a Christmas bonus which is paid at employer's option and subject to discontinuance. This bonus is a gratuity and no part of salary.

In certain breweries some employees as first or lead men receive a monthly bonus of \$10 or \$20 over base straight time pay.

Employers pay time and one-half regular base pay after eight hours worked per day and in accordance with Executive Order 9240.

Section 24. The loading and unloading of trucks driven by an employee of a brewery from a platform or space mutually agreed upon shall be considered driver's work. [23]

Section 25. The following days shall be considered holidays: New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas.

Section 26. It is further agreed that this contract shall not be altered, changed, or deviated from except with the written approval of the Joint Executive Board of the Unions.

Section 26. (a) During working hours employees shall be entitled to good beer at times to be arranged by mutual agreement, not less than four (4) times per day.

Brewers

Section 27. Eight (8) consecutive hours, exclusive of an interval of one (1) hour for meals, shall constitute a day's work, and five (5) days (respec-

tively forty (40) hours) shall constitute a week's work, with the exception of Saturday, when five (5) hours and twenty (20) minutes shall constitute a day's work. The regular working day shall not commence before seven (7) A.M., and shall not continue after six (6) P.M. All work done before seven (7) A.M. and after six (6) P.M. shall be considered overtime; provided, however, that all night men shall work eight (8) consecutive hours at regular wages, twenty (20) minutes to be allowed for lunch, but the time at which this work shall commence shall be left to a mutual understanding between the employer and the employee or employees concerned.

Section 28. One apprentice shall be permitted in each brewery employing not less than five (5) members of Local Union No. 893. In case that the number of men employed shall equal thirty (30) members, then a second apprentice may be employed, and with forty (40) members, a third one, [24] and one to every additional thirty (30). Apprentices shall be governed by the rules of the union and shall be instructed in all branches of the trade for a term of not less than two (2) years. Apprentices may work overtime, provided the shift on which they are employed is working overtime. They shall not be less than eighteen (18) nor more than twenty-five (25) years of age at the beginning of their terms of apprenticeship. Apprentices must be accepted by the union as members before starting their apprenticeship.

Section 29. It is agreed that no new or additional

apprentices may be employed in brewing, malthouse, and syrup departments, as long as the employees in said departments are being laid off in rotation, and as long as five (5) per cent of the membership of Local Union 893, Branch No. 4, Los Angeles, permitted to work in said departments are on the out of work list.

Section 30. Provided further, however, that sons of brewery and malthouse proprietors may be employed as apprentices at any time in breweries, malt houses and syrup houses controlled by their parents, so long as they do not replace a member of Local Union No. 893, Branch No. 4.

Section 31. The employer shall have the right of selection from the out of work list maintained at the office of the said local union where employment is available on a permanent basis. Provided further, that seniority on the out of work list shall prevail as to temporary employment, save and except the employer shall not be obligated to accept into his employment any temporary employees unless such employees as may be designated by the union are qualified and physically capable of performing the employment required.

Section 32. (a) No man shall be called to do [25] emergency work for less than four (4) hours, and said time shall be paid for at the rate of time and one-half, if performed after completion of the regular day or week's work. The foregoing does not apply to work recurrent in the course of regular brewery operations. Any work performed on holi-

days shall be paid for at the rate of time and one-half, and all overtime shall be equally divided where possible and where the men available for such overtime are equally qualified.

(b) It shall be understood that there shall be no overtime work when the force is being reduced, except in emergencies. This is to include working foremen, but shall not prevent first men and foremen from coming in on Saturdays, Sundays, and holidays to perform their regular work.

Section 33. The wages paid in all breweries and syrup departments shall not be less than Fifty-Nine and No/100 (\$59.00) Dollars per week for the first shift. Sixty-One and No/100 (\$61.00) Dollars for the second shift and Sixty-Three and No/100 (\$63.00) Dollars for the third shift. The wages paid to apprentices shall not be less than Forty-Four and No/100 (\$44.00) Dollars per week, for the first shift, for the first year. Forty-six and No/100 (\$46.00) Dollars for the second shift and Forty-Eight and No/100 (\$48.00) Dollars for the third shift. Forty-Six and No/100 (\$46.00) Dollars per week for the first shift for the second year, Forty-Eight and No/100 (\$48.00) Dollars for the second shift and Fifty and No/100 (\$50.00) Dollars for the third shift. The wages shall be paid in full, weekly, in lawful money of the United States.

Section 34. Should it become necessary during the dull season to lessen the working force, the men may be laid off in rotation, in an impartial manner, for not longer than one week at a time, and it is ex-

pressly understood that there [26] should be no laying off for any fractional part of a day or week. The first men and working foremen and apprentices are included in this lay-off system, arranged by employer and shop steward, and the local union.

Section 35. When men are varnishing tanks or engaging in work with explosive or inflammable materials within closed tanks, the men doing this work must have a watchman on the outside of the tank at all times, and safety apparatus shall be inspected and placed in perfect condition before the men go into the tank to perform the above work.

Section 36. A brewery also has the right to employ extra workmen during the months from April 1st to October 30th. Any man working after the 30th day of October shall be considered a steady employee.

Section 37. No man shall be forced to pile full half barrels two (2) high, unassisted.

Section 38. During working hours employees shall be entitled to good beer at times to be arranged by mutual agreement, not less than four (4) times per day.

Bottlers

Section 39. Eight (8) consecutive hours, exclusive of an interval of one hour for meals, shall constitute a regular day's work, and forty (40) hours, Monday through Friday, shall constitute a week's work. Provided, however, that employees perform-

ing work on Saturday to complete a full day's work may work six hours and forty minutes to complete a regular week's work, and such Saturday work shall be compensated for at regular wages. Any bottling work performed on Saturdays [27] shall be considered and paid for as overtime work. The regular working day for the day crew, including Saturday work, shall not commence before 7:00 a.m. and shall not continue after 6:00 p.m. If two (2) crews are employed on one unit of machinery, the regular working day of the night crew shall be eight (8) hours and shall commence at the conclusion of the working day of the day crew, providing no overtime is worked. It shall be optional, however, to arrange the hours of the night crew to the mutual satisfaction of the employer and employees. All work done in addition to the regular eight (8) hours daily work and forty (40) hours weekly work shall be considered and paid for as overtime. It shall be permissible to have men report for work before 7:00 a.m. to load out drivers on special trips or long hauls. Proprietor or foreman shall have the right of determining the number of men required to work such overtime, but where the full crew is not working overtime, no bottling or bottle washing shall be done. All overtime shall be divided, however, equally among the men employed in the shops.

All plants shall be permitted to work overtime, whether operating steadily or not. Proprietors or foremen shall have the right of determining the

number of men required to work such overtime, and all overtime shall be equally divided among the members of the shop.

Section 40. Good employer's beer shall be furnished to the employees free of charge, once during the morning shift, at noon, in the middle of the afternoon shift, and at quitting time.

Section 41. It is agreed that the firms will operate all available lines of bottling machinery during the day shifts before the establishment of night shifts, providing however, that where certain [28] lines are incapable of filling particular types of bottles, or where because of superannuated equipment a material divergency of production would result, this provision shall not apply.

Section 42. Should dullness of trade necessitate a lay-off, the employees shall be laid off in an impartial manner, in rotation, no fractional part of a day, nor more than one day per week, excepting in case of break-down. If a breakdown occurs in the forenoon, the men shall work the morning out. If a breakdown occurs in the afternoon, the men shall work the day out. It is agreed first crew may work four (4) consecutive days in any one week.

It is agreed that where extra crews are required for temporary work, the employer may work such crews four (4) consecutive days, excepting Saturday or Sunday, within two (2) weeks period, provided that existing crews are working five (5) days per week.

Should a reduction of the working force become necessary to comply with this section as to the minimum crew and time worked, the first men hired shall be the last to be laid off; further, if help is again called, the last man or men in point of service who were laid off shall be the first to be rehired. It is agreed that all employees shall receive equal chances at any work performed on days that the shop is not bottling, whether such work is considered bottlers' work or not. The loading and unloading of cars of beer, bottle-house supplies and all work performed on same, shall be considered bottlers' work, providing such car is located on the bottlehouse premises; it being understood, however, that loose bottles in carload lots shall be crated and handled by union bottlers, regardless of where such car may be spotted. Employer shall notify [29] employees twelve (12) hours or more before time in case of layoff.

Section 43. Temporary help may be employed, but in case of dullness of business such temporary help shall be dispensed with.

Section 44. The minimum weekly wage shall not be less than Fifty-Four Dollars and Fifty Cents (\$54.50) per week for the first shift. Fifty-Six Dollars and Fifty Cents (\$56.50) for the second shift and Fifty-Eight Dollars and Fifty Cents (\$58.50) for the third shift. Wages to be paid in full, weekly, in lawful money of the United States of America.

Section 45. No employee shall be required to change shifts during the calendar work week, unless

such employee shall have had a period of at least twelve (12) hours between the conclusion of the last shift worked and the commencing of a new or different shift to which he may be assigned. Provided that for overtime work, any man available who has not worked the preceding twelve (12) hours may be used. It shall be permissible in any event to change employee or employee's shift at the end of each work week. It is understood and agreed that where it is necessary in emergency cases to load or unload trucks after the Saturday closing hour, the employer shall have the right to use any man or men about the premises who is available for such emergency work. It is also agreed that should an emergency arise after the closing hour in the bottling plant, brewery, or shipping rooms, on days other than Saturdays, the employer reserves the right to have the same privilege as is specified, after the closing hours on Saturday.

Section 46. All holiday, Sunday and overtime work shall be paid for at the rate of time and one-half. [30]

Section 47. Foremen or assistant foremen shall do no work in shops unless they are members of the union. Nothing, however, in this agreement shall be construed as to interfere with the right of the foremen to look after machinery or assist at short intervals whenever a man is lacking, providing in such case application is made to the union for a man to fill the vacancy.

Drivers

Section 48. Five (5) consecutive days out of each calendar week, Monday through Friday, shall constitute a regular week's work and the regular work days shall be eight (8) hours per day and forty (40) hours in all shall constitute a regular work week, except that employers shall have the right to employ so-called "hot-shots" who will work Tuesday through Saturday. Saturday to be a premium day, except for "hot-shots," and time and one-half shall be paid. A driver called in on Saturday, who is not on the regular payroll, will be paid at the rate of time and one-half, even though he may be operating as a "hot-shot." All Sunday work shall be paid for at the rate of time and one-half.

All time worked in addition to the maximum hours provided as constituting a regular work day, or in excess of forty (40) hours per week, shall be considered as overtime and compensated for at the rate of time and one-half. The regular work day shall not commence before seven o'clock a.m. and shall not continue after six o'clock p.m., provided, however, that special drivers on special trips shall be permitted to start at any time and shall work a regular day at regular wages. The regular day's work of eight (8) hours shall be exclusive of a period of twenty (20) minutes for settling up. In the event that more than twenty (20) minutes is required for settling-up, [31] all settling-up time in excess of that included in the regular daily work

day shall be compensated for at the overtime rate computed to the nearest half hour.

Section 49. On Labor Day keg beer drivers and helpers and bottle beer drivers and helpers will be allowed to deliver for three (3) hours only, commencing at seven (7) a.m. and discontinuing at ten (10) a.m., and shall be paid at the rate of time and one-half. Except that beer may be delivered to picnics when orders are placed for forty-eight (48) hours previously to delivery date.

Section 50. The minimum scale of wages shall not be less than \$58.00 per week for keg beer drivers, bottle beer drivers, and shipping drivers and special drivers, and \$55.00 per week for helpers on keg beer trucks, bottle beer trucks and shipping trucks, and night loaders shall be paid \$60.00 for second shift—wages to be paid in full, weekly, in lawful money of the United States of America.

Section 51. Drivers, upon authorization of credit department of brewery, having left beer on credit shall receive receipt for same, and this being given to his employer, shall be considered sufficient sanction for the same and he shall not be held responsible for payment thereafter.

Section 52. Beer drivers and helpers may be laid off not more than one (1) week at a time, impartially and in rotation.

Section 53. Extra shipping drivers and helpers shall be furnished by the union for the purpose of

getting out rush orders. Such extra help can be dispensed with when the work for which they have been engaged is finished. Extra drivers or [32] regular drivers and helpers who have been temporarily laid off shall not be called into service for a fractional part of a day unless they be given a full day's pay for the same. If a rush order or an unavoidable accumulation of empties require more shipping facilities than a brewery or bottling establishment has vehicles to handle, then in that case draying firms may be employed to complete such work.

Section 54. Employing firms desiring their drivers or helpers to wear uniforms advertising their products or firm names, shall arrange the cost of same by mutual agreement between the firms and the union representatives; provided, however, that the cost shall be borne equally by employer and employee, save and except the share to be borne by employee shall in no event exceed the sum of Three Dollars (\$3.00) in all for each uniform. In the event of an overage, the same shall be borne by the employer.

Men shall report for work clean and presentably dressed, ready to meet the public or pass public inspection.

Section 55. All chauffeurs and helpers shall be at their post of duty at the time designated.

Section 56. Keg and bottle beer may be hauled in the same truck.

Checkers

Section 1. Only members in good standing who are members of Local Union No. 884 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America shall be employed as checkers and shipping clerks in the shipping department and receiving department, having to do with the loading and unloading of trucks, handling of malt beverage [33] products at platforms maintained for such purposes by the employer. The employer shall have the right of selection of employees to perform such work from any source. Provided, however, if such employees be not members of the Union at the time of commencement of the employment, they shall be required before commencing work to apply for a permit card from said Local Union No. 884.

Section 2. Five consecutive days out of each calendar week, except Sunday, shall constitute a regular week's work, and the regular work day shall be eight hours per day, exclusive of one hour for meals, and forty hours in all shall constitute a regular work week. The regular work week may commence, at the option of the employer, on either Monday or Tuesday of each week, and in such cases where a holiday or a day on which no beer can be delivered by reason of local, state or federal statute, then such days shall constitute the day off other than Sunday, and eight hours may be worked on Saturday or Monday at regular wages, where nec-

essary, to complete the regular work week of forty hours. The regular work day shall not commence before 7:00 a.m. and shall not continue after 6:00 p.m. A second shift may be employed at the discretion of the employer, the starting time to be determined by the necessity of business, but work performed between the hours of 6 p.m. and 7 a.m. shall be compensated for at an additional rate of five cents per hour for second shift in addition to the regular hourly rate, based upon the weekly wage paid to such employee and ten cents per hour for third shift. All work performed after eight consecutive hours, exclusive of one hour for meals, shall be paid for at the rate of time and one-half and time off shall not be accepted as a substitute. The employer shall have the right to determine the number of [34] men to work overtime. Overtime shall be divided among the men as equitably as possible. However, it is permissible to rotate men irregularly in cases where special work is to be done for which certain men are better qualified or more adaptable.

All wages shall be paid weekly in lawful money of the United States, as follows:

For permanent receiving and shipping clerks, a minimum weekly wage of not less than \$50.50 per week for the first shift; for the second shift \$52.50 and for the third shift \$54.50.

Section 3. Should dullness of trade necessitate a layoff, the employees shall be laid off in an impartial way, in rotation, but no one shall be laid off longer than one week, nor less than one day at a

time. Should permanent reduction of the working force become necessary, employees shall be laid off impartially according to seniority, all things being equal.

Section 4. If during the busy season it is necessary to employ extra help, such help shall be employed through Local No. 884, under the permit card system. In case of layoff or reduction of working force, the permit card men shall be laid off before Union card men.

This contract shall be in full force and effect from date to May 1, 1947.

In Witness Whereof, the parties have hereunto set their hands and seals by their respective representatives, this 28th day of July, 1946.

This contract applies only to breweries of Southern California.

For the Employees:

JOINT LOCAL EXECUTIVE BOARD OF
CALIFORNIA.

By MARTIN CHRISTEN,
Secretary. [35]

For the Employer:

CALIFORNIA STATE BREWERS INSTITUTE
FOR INSTITUTE MEMBERS IN
SOUTHERN CALIFORNIA.

JAMES G. HAMILTON,
Secretary.

FOR LOS ANGELES BREWING CO. AND
GRACE BROS. BREWING, LTD.

By JAMES M. McROBERTS.

The contract of July 28, 1946, this day executed by James G. Hamilton as secretary for the California State Brewers Institute for brewery members of the Institute in Southern California with the Joint Local Executive Board of California for Locals 884, 893, 396, 888 and 203 is executed for and on behalf of the Bohemian Distributing Company, a corporation, in so far as such contract is applicable to driver, bottling and checker employees of said corporation, who handle malt beverages.

Dated July 29, 1946.

BOHEMIAN DISTRIBUTING COMPANY,
By JAMES G. HAMILTON. [36]

State of California,
County of Los Angeles—ss.

Charles J. Lick, 'being by me first duly sworn, deposes and says: that he is an officer, to wit: Vice-President, of respondent, Los Angeles Brewing Co., a corporation, and makes this verification on its behalf as such duly authorized officer; that he has read the foregoing Answer of Respondent to Petitioners' Petition, and knows the contents thereof; and that the same is true of his own knowledge,

except as to the matters which are therein stated on his information or belief, and as to those matters that he believes to be true.

/s/ CHARLES J. LICK.

Subscribed and Sworn to before me this 17th day of February, 1947.

[Seal] /s/ LAURA TEETER,
Notary Public in and for said
County and State.

Received copy of the within Answer this 18th day of February, 1947.

/s/ JAMES M. CARTER,
U. S. Attorney,

By /s/ GERTRUDE M. JOHNSON.

[Endorsed]: Filed Feb. 18, 1947.

At a stated term, to wit: The February Term. A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday, the 1st day of April, in the year of our Lord one thousand nine hundred and forty-seven.

Present:

The Honorable: Paul J. McCormick, District Judge.

No. 6322-M Civil

FRED ILIA IOB, et al.,

plaintiffs,

vs.

LOS ANGELES BREWING CO., INC., etc.,
Defendant.

This Cause coming on for trial; James C. R. McCall, Jr., Assistant U. S. Attorney, appearing as counsel for the plaintiffs; James M. McRoberts, Esq., appearing as counsel for the defendant; and both sides answering ready, it is ordered to proceed. Counsel stipulate to certain facts. Plaintiffs' Exhibits 1, 2, and 3 are received in evidence.

Fred Ilia Iob and Walker F. Ullrich, respectively, are called, sworn, and testify for the plaintiffs. Counsel stipulate as to testimony of Plaintiff Dobbs. Geo. E. Cowdrey, B. H. Koenig, and Anna M. Peukert, respectively, are called, sworn, and testify for the plaintiffs.

At 12:07 P.M. court recesses herein to 8 P.M. at 2:05 P.M. court reconvenes and all being present as before, the plaintiffs rest.

Attorneys McRoberts moves for dismissal, states the grounds, and argues. The said motion is denied without prejudice.

Robert Ziegler, Elmer Schaffer, and Anton J. Ziegler, respectively, are called, sworn, and testify for the defendant. Defendant's Exhibits A and B are received in evidence. John Hoff is called,

sworn, and testifies for the defendant. The defendant rests. At 3:30 P.M. court recesses.

At 3:35 P.M. court reconvenes herein and all being present as before, Samuel M. Dobbs is called, sworn, and testifies for the plaintiffs. [38]

At a stated term, to wit: The February Term. A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday, the 2nd day of April, in the years of our Lord one thousand nine hundred and forty-seven.

Present:

The Honorable: Paul J. McCormick, District Judge.

No. 6322-M Civil

FRED ILIA IOB, et al.,

Plaintiffs,

vs.

LOS ANGELES BREWING CO., INC., etc.,

Defendant.

This cause coming on for further trial; James C. R. McCall, Jr., Assistant U. S. Attorney, appearing as counsel for the plaintiffs; James M. McRoberts, Esq., appearing as counsel for the de-

fendant; Attorney McCall argues to the Court for the petitioner. The Court discusses certain matters with Attorney McCall and makes a statement. Attorney McCall argues further. The Court and Attorney McCall discuss certain matters further.

At 10:38 A.M. Attorney McRoberts argues. The Court and counsel generally discuss the questions involved in the case. The Court makes a statement that it is prepared to adopt the statements made from the bench as the findings in this case to deny the injunctive relief and to hold that because of the language of the Statute in sub-section (b) of Sec. 8 of the S.T. & S.A. (Title 50 App. U.S.A. Sec. 388) the injunction should not issue and that if in order to place the petitioners in the positions which they need at the time of their going in the military service, it is necessary that some equitable process of injunction or restraining order or mandatory edict should be issued by this Court, the circumstances shown by the evidence and the employer's circumstances as shown by the evidence having been changed since the workers' return so as to **make it** impossible and unreasonable by this Court by its injunctive process to place them in their positions. Counsel will prepare findings.

Witnesses Ullrich, Koenig, and Cowdrey, respectively, heretofore sworn, testify further. Both sides rest.

It is ordered that the cause is hereby continued to April 2, 1947, at 10 A.M., for further trial. [39]

[Title of District Court and Cause.]

PETITIONERS' MOTION FOR NEW TRIAL
WITH LEAVE TO ADD PARTIES

Petitioners Iob, Dobbs and Ullrich move the Court for a new trial under Rule 59(a,d) of the F.R.P.C., with leave to amend the petition so as to add the following as additional parties respondent, to wit:

Bottlers Local Union No. 896 and Brewers, Maltsters & Yeast Workers Local Union No. 893, both local labor unions of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, an unincorporated international labor union: Joint Local Executive Board of California, an unincorporated association of local labor unions affiliated with said international union, which includes said local labor unions in its membership; and Walter Eckberg, president, and Anthony Zeigler, secretary, officers of said local union No. 896, and Thomas Vacca, president and Elmer Schaffer, secretary, officers of said local union No. 893.

Petitioners also move to defer consideration of proposed findings of fact and conclusions of law, and judgment, until after such new trial. [42]

The grounds of the motion are:

1. That since the trial of this case and the oral announcement of the Court's opinion on April 1, 1947, the Supreme Court of the United States, in the case *Trailmobile Co. v. Whirls*, decided April

14, 1947, held that during a veteran's statutory year of reemployment his restored rights cannot "be altered adversely by the usual processes of collective bargaining," thereby confirming petitioners' claim that their discharges were unlawful, notwithstanding the agreement entered into in July, 1946, between the respondent and the proposed additional respondents named in the motion.

2. The proposed additional respondents have, under the Court's construction of the said July agreement, an interest, either direct or indirect, in the reinstatement of petitioners to their former jobs.

Points and authorities are attached.

JAMES M. CARTER,

United States Attorney,

RONALD WALKER,

Assistant U. S. Attorney,

Chief of Civil Division,

JAMES C. R. McCALL, JR.,

Assistant U. S. Attorney,

By /s/ JAMES C. R. McCALL, JR.,

Assistant U. S. Attorney,

Attorneys for Petitioners.

At a stated term, to wit: The February Term. A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 19th day of May, in the year of our Lord one thousand nine hundred and forty-seven.

Present:

The Honorable: Paul J. McCormick, District Judge.

No. 6322-M Civ.

FRED ELIA IOB, et al.,

Plaintiffs,

vs.

LOS ANGELES BREWING CO.,

Defendant.

This cause coming on for hearing motion of petitioners for new trial; James C. R. McCall, Jr., Asst. U. S. Attorney, appearing for the petitioners; James M. McRoberts, Esq., appearing for the respondent; Attorney McCall moves for new trial; Attorney McRoberts opposes motion; it is ordered that the motion for new trial with leave to amend is granted for the purpose of enabling the U. S. Attorney to bring into the case the appropriate labor organization. [46]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 6322-M Civil

FRED ELIA IOB, SAMUEL M. DOBBS, and
WALDEMAR F. ULLRICH,

Petitioners,

vs.

LOS ANGELES BREWING CO., INC., a corporation; JOINT LOCAL EXECUTIVE BOARD OF CALIFORNIA, an unincorporated association of representatives of local labor unions chartered by the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America; and BOTTLERS LOCAL UNION NO. 896 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS and WAREHOUSEMEN and HELPERS OF AMERICA, an unincorporated local labor union, and WALTER ECKBERG, president, and ANTHONY ZEIGLER, secretary, of said Local No. 896; and BREWERS, MALTSTERS & YEAST WORKERS LOCAL UNION NO. 893 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN and HELPERS OF AMERICA, an unincorporated

ated local labor union, and THOMAS VACCA, president, and J. S. ALLWINE, secretary of said Local No. 893,

Respondents.

AMENDED PETITION FOR ENFORCEMENT OF VETERANS' REEMPLOYMENT RIGHTS

Come the petitioners above named, and pursuant to leave of the Court heretofore granted, file this Amended Petition, against the eight respondents named in the caption, and respectfully allege:

I.-VIII.

Petitioners adopt and incorporate herein by this reference, all of the allegations contained in Paragraphs I to VIII, inclusive, of their original Petition filed herein on January 23, 1947. The word "respondent," as used in [47] said paragraphs, designates the respondent Los Angeles Brewing Company, Inc., which is hereinbelow referred to in this Amended Petition as "the Company."

IX.

The International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America is an unincorporated international labor union, which from time to time, issues charters to, and recalls them from, various local labor unions functioning under its jurisdiction. Said international union is more familiarly known, and is referred to hereinbelow by the name "Teamsters International." Respondent Bottlers Local Union No. 896 of said Teamsters International, and respondent

Brewers, Maltsters & Yeast Workers Local Union No. 893 of said Teamsters International, are unincorporated local labor unions charters by the said Teamsters International on or about July 28, 1946. The individual respondents are officers of said local labor unions, in the capacities stated in the caption. The said local unions will be referred to as "Teamsters Local 896" and "Teamsters Local 893," respectively. Respondent Joint Local Executive Board of California is composed of representatives of various local labor unions of Teamsters International. It acts as a collective bargaining agent for such locals, whose members are employed in California breweries, including Teamsters Locals 896 and 893. Said Joint Board will be referred to hereinafter as the "Teamsters Council."

X.

The International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America is also an unincorporated international labor union, which, from time to time, issues charters to, and recalls them from, various local unions functioning under its jurisdiction. Said international union is more familiarly known, and is referred to hereinbelow, as the "Brewery Workers International." Bottlers Local Union No. 293 and the Brewers, Maltsters & Yeast Workers Local Union No. 7 are two local unions chartered by the Brewery Workers International; and they will be referred to hereinafter by the names "IBW Local 293" and "IBW Local 7," respectively. [48]

XI.

Continuously, for about 20 years or more prior to July 27, 1946, the respondent Company required of all bottlers in its employ that they be members in good standing of IBW Local 293, and of all brewers in its employ that they be members in good standing of IBW Local 7. Prior to World War II, this requirement was made by virtue of a collective bargaining agreement existing between the Company and various local unions of the Brewery Workers International, including IBW Locals 293 and 7. After the beginning of World War II, this requirement was continued in effect by the Company, until July 27, 1946, under a policy approved by a directive order of the War Labor Board, although a current contract formally signed by the Company and such local unions was not then in effect. Petitioners are now, and, from the beginning of their original employment by the Company, have been members in good standing of the appropriate IBW local unions, i.e., petitioner Iob, of IBW Local 7, and petitioners Dobbs and Ullrich, of IBW Local 293.

XII.

Petitioners are informed that the additional respondents added by this amended petition, to wit, all the respondents other than the Company, claim to have an interest in whether or not petitioners shall be restored to their former positions by the Company; and that said added respondents caused the Company to discharge the petitioners, on the

dates aforesaid, and in the manner hereinafter stated, on account of the fact that on July 28, 1946, the Company entered into a contract, purporting to be a "closed shop" contract, with the respondent Teamsters Council, under which the Company agreed that only members in good standing of respondent Teamsters Local 896 "shall be employed" as bottlers in its brewery, and that only members in good standing of Teamsters Local 893 "shall be employed" as brewers in its brewery. Thereafter, the Company ceased to insist upon membership in IBW Locals 296 and 7 by its employed bottlers and brewers, and thereafter, insisted that they be members of Teamsters Local 896 and 893, respectively. A copy of said contract of July 28, 1946, is attached as Exhibit "A" to the answer of the respondent Company filed herein on February 18, 1947. [49]

XIII.

Petitioners are informed, believe and state that in order for them to become members of Teamsters Locals 896 or 893, they would be obliged to make application for, and be admitted to, membership by said locals, and to pay admission fees and dues thereto, in addition to the fees and dues already paid and being paid, by them to the IBW locals, of which they were already members; and that their reemployment rights were adversely affected by said Company's new requirement that they become members of said Teamsters Local unions as a condition of continued employment in their former positions. In August and September, 1946, upon complaint

of the respondents Teamsters Locals 896 and 893, made pursuant to said purported "closed shop" contract of July 28, 1946, the Company began firing bottlers and brewers from its employ who were then members in good standing of IBW Locals 293 and 7 but had not made application for, or been successfully admitted to, membership in said Teamsters Local 896 or 893, respectively.

XIV.

All eight of said respondents have construed and applied said July 28, 1946, contract as a "closed shop" agreement, effective at once against all bottlers and brewers in the Company's employ, who might not be members of said Teamsters Locals 896 or 893, including returned veterans of the armed forces during the reemployment year provided for in Section 8 of the Selective Training and Service Act of 1940. Petitioners are advised, believe and state that said agreement of July 28, 1946, is not, and never has been, legally effective as a "closed shop" contract against either reemployed veterans, with reemployment rights, or against workmen employed by the Company as bottlers or brewers on and before July 28, 1946. Petitioners are further informed, believe and state that at the time the said contract was entered into, the National Labor Relations Board had not certified the Teamsters Council as the collective bargaining agent for any portion of the Company's employees; and that said Board had not, and did not, prior to December, 1946, determine what unit of the Company's em-

ployees might be a proper unit for collective bargaining with the Company, through such Teamsters Council; and that said Board has not yet certified said Teamsters Council as the collective [50] bargaining agent for the Company's employees. They accordingly represent that said Teamsters Council had no right to enter into a "closed shop" contract as the purported "representative" of the Company's employees in July 28, 1946, as the Company well knew.

XV.

Petitioners are informed, believe and state that petitioner Iob, although not a member of the Teamsters Local 893, was reemployed by the Company as a brewer as aforesaid on September 9, 1946, with the express consent of said Teamsters Local 893, given through respondent Elmer Schaffer, the secretary thereof; that he was then discharged by the Company on September 17, 1946, on demand of the said Schaffer, acting for said Teamsters Local 893, on the sole ground that said petitioner was not then a member of said local. Petitioner Iob was again reemployed by the Company as a brewer as aforesaid on November 6, 1946, with the express consent of said Teamsters Local 893, given through the said Schaffer, although he was not then a member of said local, as Schaffer and said local well knew; and he was again thereafter discharged by the Company on November 25, 1946, on demand of the same said Schaffer, acting for said local, once again upon the sole ground that he was not then a member of

said local. Petitioner Iob never agreed to apply for or to become a member of said local; and the wavering actions of the said local, above described, were caused by the fact, as he is informed, believes and states, that the said local itself recognized, and agreed, prior to November 25, 1946, that petitioner Iob, as a returned veteran of the armed forces was entitled by law to be reemployed and retained in his position as a brewer by the Company for one year, notwithstanding his failure to become a member of said Teamsters Local 893.

XVI.

Petitioners Dobbs and Ullrich, after being reemployed in their former positions, as aforesaid, were prevented from working between September 21, 1946, and October 5, 1946, by the fact that on September 21, 1946, a strike was called against the Company by IBW Locals 296 and 7 and other IBW locals, in protest against the firing by the Company of bottlers and brewers who had not joined [51] Locals 896 and 893 since July 28, 1946, and by the establishment and maintenance of a picket line by said IBW local unions at the entrance to the Company's brewery. In order to go to work, petitioners would have had to cross said picket line maintained by their own IBW local union. Said picket line was maintained until March 26, 1947, but has been discontinued since that date. On or about September 23, 1946, the Company, through its superintendent in charge of employment, informed petitioner Ullrich and others, who had not crossed said picket

line, that their employment by the Company had not been terminated, and that the Company would not issue termination slips to such workmen, nor even to the strikers. Said termination slips were necessary to entitle such strikers and workmen to secure state unemployment compensation, or to secure the advice of the state employment service in seeking employment elsewhere. The Company's superintendent at that time informed them that they were still considered "employees" of the Company.

XVII.

Thereafter, on or about September 31, 1946, petitioners Dobbs and Ullrich, with certain other veterans of the armed forces, also formerly employed as bottlers, informed said superintendent that they were ready and willing to go back to work, and would report therefor at the brewery the next morning, if he would permit them to do so. The superintendent then informed them that before they could come back to work, they would have to have a clearance therefor from Anthony Zeigler, secretary and business agent of Teamsters Local 896. They then went to the office of said Teamsters Local 896, and were informed by respondent Zeigler that they were "through" as employees of the Company; that he would take their applications for membership in said Teamsters Local, if they wished to submit them; but that they would not be permitted to return to work at the Company's brewery, even if admitted to membership; that they would have to be content with calls to temporary work at other

breweries as needed, and without seniority in their jobs with the Company. On October 5, 1946, petitioners Dobbs and Ullrich again reported to the Company's superintendent in charge of employment and informed him that Zeigler had refused to clear them for work at [52] the Company's brewery, but that they were then ready to go to work in their former positions, if he would permit it. The said superintendent then communicated with the respondent Zeigler by telephone, as petitioners are informed, believe and state, and then informed them that there was "nothing that he could do about it," and that they could not go back to work in their former positions so long as Teamsters Local 896, through Zeigler, refused to consent for them to be so employed. Petitioners Dobbs and Ullrich are informed that this constituted a discharge "without cause" from their restored positions; and since that dated they have not been employed by the Company.

XVIII.

Petitioners represent that their reemployment rights have been adversely affected by all of the respondents, through the execution, and application to them of the aforementioned "closed shop" contract of July 28, 1946; and that each petitioner was, by the joint action of the various respondents, unlawfully discharged, without cause, from his restored position within one year after such restoration, as aforesaid. Petitioners are accordingly advised that each of them is entitled to be restored by

the Company to his said position for the portion of his reemployment year that remained unexpired when he was discharged, together with his original seniority rights in the Company's service, and to be compensated for his interim loss of wages suffered by reason of such discharge.

Wherefore, Petitioners Pray:

(a) That the reemployment rights of the petitioners be adjudicated and declared, as against all eight of the respondents.

(b) That the respondent Los Angeles Brewing Company, Inc., be ordered, directed and specifically required: (1) To reemploy and restore each petitioner to his former position in its employ, without any loss of seniority; and (2) To retain each petitioner in such position, without discharge therefrom, unless for legal cause, for a period equal to that portion of his reemployment year that remained unexpired when he was so discharged.

(c) That each of the respondents, their officers and agents, other than the respondent Los Angeles Brewing Company, Inc., be enjoined not to [53] interfere with such employment of the petitioners by said Company for said period.

(d) That all of the respondents, or such of them as may be liable therefor, be required to compensate each petitioner for his interim loss of wages pending such restoration.

(e) That a preliminary injunction issue requiring the Company to restore the petitioners to its employ as aforesaid, pending the trial of this case,

and enjoining the other respondents not to interfere with such employment, during such period; and that at the hearing such injunction be made permanent for the balance of the reemployment year of each petitioner, as aforesaid.

(f) That the respondents, and each of them, be required to show cause, if any exists, why such preliminary and permanent injunctions should not issue.

(g) That petitioners recover of the respondents the fees and costs of the United States herein for its benefit.

(h) That petitioners have all such other, further and different relief as they may be entitled to in the premises, and that they have general relief.

JAMES M. CARTER,
United States Attorney,

RONALD WALKER,
Assistant U. S. Attorney,
Chief of Civil Division,

By /s/ JAMES C. R. McCALL, JR.,
Assistant U. S. Attorney,
Attorneys for Petitioners.

State of California,
County of Los Angeles—ss.

Fred Elia Iob, makes oath that the statements made in the foregoing Amended Petition as of his own knowledge are true, that those made on information and belief, he believes to be true, and that

the entire Amended Petition is true to the best of his knowledge, information and belief.

/s/ FRED ELIA IOB,
Petitioner.

Subscribed and sworn to before me this 27th day of May, 1947.

EDMUND L. SMITH
Clerk, United States District Court, Southern District of California.

[Seal] /s/ CHARLES A. SEITZ,
Deputy. [55]

State of California,
County of Los Angeles—ss.

Samuel M. Dobbs, makes oath that the statements made in the foregoing Amended Petition as of his own knowledge are true, that those made on information and belief, he believes to be true, and that the entire Amended Petition is true to the best of his knowledge, information and belief.

/s/ SAMUEL M. DOBBS,
Petitioner.

Subscribed and sworn to before me this 27th day of May, 1947.

EDMUND L. SMITH,
Clerk, United States District Court, Southern District of California.

[Seal] /s/ CHARLES A. SEITZ,
Deputy. [56]

State of California,
County of Los Angeles—ss.

Waldemar F. Ullrich, makes oath that the statements made in the foregoing Amended Petition as of his own knowledge are true, that those made on information and belief, he believes to be true, and that the entire Amended Petition is true to the best of his knowledge, information and belief.

/s/ WALDEMAR F. ULLRICH,
Petitioner.

Subscribed and sworn to before me this 28th day of May, 1947.

EDMUND L. SMITH,
Clerk, United States District Court, Southern District of California.

[Seal] /s/ CHARLES A. SEITZ,
Deputy.

[Endorsed]: Filed May 28, 1947. [57]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the Petition and the Amended Petition herein, verified by the affidavits of the petitioners,
It Is Ordered that the following respondents, to wit:

Los Angeles Brewing Company, Inc.; and, Joint

Local Executive Board of California; and Bottlers Local Union No. 896 of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, and Walter [58] Eckberg, president, and Anthony Zeigler, secretary, thereof; and Brewers, Maltsters & Yeast Workers Local Union No. 893 of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, and Thomas Vacca, president, and Elmer Schaffer, secretary, thereof:

Show cause before this Court at a stated term thereof to be held in the Federal Building in the City of Los Angeles, State of California, on the 5th day of June, 1947, at 10:00 o'clock in the forenoon of said day, why an order should not be made and entered in the above entitled action which shall direct and require the respondent Los Angeles Brewing Company, Inc. to restore the petitioners to their former positions in its employ, without loss of seniority, i.e., petitioner Fred Elia Iob to the position of brewer and the petitioners Samuel M. Dobbs and Waldemar F. Ullrich to the positions of bottlers, in accordance with the prayers of the Amended Petition, and which order shall enjoin the other named respondents, their officers and agents, from interfering with such employment.

It Is Further Ordered that the service of a copy of this Order to Show Cause, together with a copy of the Petition and of the Amended Petition, on the said respondents, on or before the 29th day of May, 1947, shall be sufficient notice hereof.

Dated at Los Angeles, California, the 28th day of May, 1947.

PAUL J. McCORMICK,
U. S. District Judge.

[Endorsed]: Filed May 28, 1947.

At a stated term, to wit; The February Term. A.D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday, the 5th day of June, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Paul J. McCormick,
District Judge.

No. 6322-M Civ.

FRED ELIA IOB, et al.,

Petitioners,

vs.

LOS ANGELES BREWING CO., INC., et al.,
Respondents.

This cause coming on for hearing order to show cause why petitioners should not be restored to former positions, without loss of seniority; James C. R. McCall, Jr., Asst. U. S. Attorney, appearing as counsel for Petitioners; James M. McRoberts, Esq.,

appearing as counsel for respondent Los Angeles Brewing Co.; P. H. McCarthy, Jr., Esq., appearing specially for respondents Brewers, Maltsters & Yeast Workers Local Union 893 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Thomas Vacca and J. S. Allwine, presents in behalf of said respondents, a motion to dismiss, vacate and set aside alias summons, amended petition, order to show cause and affidavits and memorandum in support of motion. Attorney McCarthy states that failure to make service of the documents as provided in the order to show cause constitutes violation of the rules; and that failure to serve memorandum of law constitutes a waiver of the motion of petitioners. The documents are received by the Court, read, and argument thereon is ordered.

Attorney McCall argues to the Court for the petitioners in support of the order to show cause. Attorney McCarthy makes statement. Attorney McCall continues his argument.

Attorney McCarthy argues for the respondents. Attorney McCall makes statement and requests that testimony of Mr. McCarthy be taken and it is so ordered. P. H. McCarthy, Jr., is called, sworn, and testifies on direct examination by Attorney McCall. Respondents' exhibits A and B are marked for identification and later ordered [63] filed. Wm. S. Sweeney is called, sworn, and testifies for petitioners. Witness McCarthy resumes his testimony.

Respondents' exhibits C, D, E and F are marked for identification and are ordered filed. Witness Sweeney, previously sworn, is re-called and resumes his testimony. Exhibits heretofore marked as D, E, and F are filed as Ct's, 1, 2 and 3 in evidence. The Court overrules motion of respondents to vacate and set aside service of alias summons as to said respondents Brewers, Maltsters and Yeast Workers Local Union #893 of International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America; Thomas Vacca and J. S. Allwine. Attorney McRoberts presents motion on behalf of respondent Los Angeles Brewing Co. to dismiss petition as to said respondent and same is ordered filed. The motions to dismiss of respondents Los Angeles Brewing Co. and Local Union #893, etc., et al., are filed, together with documents in support thereof.

Attorney McCall moves to amend petition to substitute name of J. S. Allwine as a party respondent in place of Elmer Schaffer and it is so ordered. It is further ordered that further hearing on order to show cause be had on Saturday, June 7, 1947; 9:30 a.m. [64]

[Title of District Court and Cause.]

MOTION TO DISMISS, VACATE AND SET
ASIDE ALIAS SUMMONS, AMENDED PE-
TITION FOR ENFORCEMENT OF VET-
ERANS EMPLOYMENT RIGHTS, ORDER
TO SHOW CAUSE, AND AFFIDAVITS,
AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MO-
TION

The respondents, Brewers, Maltsters and Yeast Workers Local Union No. 893 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated local labor union and Thomas Vacca, and in addition thereto, J. S. Allwine, not a respondent named herein either specifically or as a respondent whose name is unknown and each of them appearing specially by their counsel and the counsel of each of them, move the court as follows: [65]

1. To dismiss, vacate and set aside the Alias Summons and Amended Petition for Enforcement of Veterans Rights filed in the above entitled matter and that certain Order to Show Cause issued by the above entitled court on the 28th day of May, 1947, upon the ground that the above entitled court was without jurisdiction to order or permit the filing of said Amended Petition and issuance of said Alias Summons and was without jurisdiction to make said Order to Show Cause and is without jurisdiction to proceed upon said Petition and is

without jurisdiction to proceed upon said Order to Show Cause other than to dismiss, vacate, and set aside said Alias Summons, said Petition and said Order to Show Cause.

2. That the joinder of the moving parties herein appearing specially is and was at this stage of the proceedings and upon the terms laid down by the court as to each said moving party a denial of due process and a violation of the Vth Amendment of the Constitution of the United States.

3. That the Amended Petition fails to state a claim upon which relief may be granted.

4. As to J. S. Allwine, to dismiss, vacate and set aside Alias Summons, Amended Petition and Order to Show Cause upon the grounds that he is not named therein specifically or as an unknown respondent.

5. As to J. S. Allwine, to dismiss, vacate and set aside said Alias Summons, Amended Petition and Order to Show Cause upon the grounds that he is not now and never was an officer of said Local 893.

6. As to J. S. Allwine, to dismiss, vacate and set aside the service of said Alias Summons, Amended Petition and Order to Show Cause upon the grounds that they and each of them was not served upon him within the time provided for by the rules of court or by said Order to Show Cause or either of them and the grounds [66] set out in paragraphs 4 and 5 above.

7. As to Thomas Vacca, to dismiss, vacate and set aside said Alias Summons, Amended Petition and Order to Show Cause upon the grounds that he is not now and never was president of said Local 893 and is not now and never was an officer of said Local 893.

8. As to Thomas Vacca, to dismiss, vacate and set aside the service of said Alias Summons, Amended Petition and Order to Show Cause upon the grounds that they and each of them was not served upon him within the time provided for by the rules of court or by said Order to Show Cause or either of them and the grounds set out in paragraph 7 above.

9. As to said Local 893, to dismiss, vacate and set aside the service of said Alias Summons, Amended Petition and Order to Show Cause upon the grounds that they and each of them was not served upon it in the manner prescribed by the rules of court or at all.

10. As to said Local 893, to dismiss, vacate and set aside the service of the said Alias Summons, Amended Petition and Order to Show Cause upon the grounds that they and each of them was not served upon said Local 893 within the time prescribed by the rules of court or by the said Order to Show Cause.

Dated June 4, 1947, San Francisco, Calif.

/s/ P. H. McCARTHY, JR.,

Attorney for Brewers, Maltsters and Yeast Workers
Local Union No. 893 of the International
Brotherhood of Teamsters, Chauffeurs and
Warehousemen and Helpers of America,
Thomas Vacca, respondent, appearing specially
and J. S. Allwine, appearing specially. [67]

AFFIDAVIT

State of California,

City and County of San Francisco—ss.

P. H. McCarthy, Jr., being duly sworn, deposes
and says:

That at all times mentioned in the Amended Petition for enforcement of Veterans' Re-employment rights, including the period since the filing thereof, Thomas Vacca has not been and is not now President and Elmer Schaffer has not been and is not now Secretary and J. S. Allwine has not been and is not now Secretary of Brewers, Maltsters and Yeast Workers Local Union No. 893 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America named in said Amended Petition as Brewers, Maltsters & Yeast Workers Local Union No. 893 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, with main office in San Francisco, California.

That since July, 1946, the Union of which the

Petitioner, and each of them, is a member, to-wit; the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, chartered by the Congress of Industrial Organizations (C.I.O.) has claimed the right to represent the employees of the California Breweries, including the Los Angeles Brewing Co., respondent employer.

That on August 2, 1946, said Union, acting for and on behalf of its members including the petitioners herein, instituted an action in the Superior Court of the State of California, in and for the County of Los Angeles, numbered No. 517-511 therein, to compel the respondent employer and all other Brewing Companies in the Los Angeles area to discharge all of said respondent employers' employees employed in the Brewing, Bottling and Delivery Departments, including veterans who were members of [68] Unions affiliated with the American Federation of Labor and to hire and employ only members in good standing in the C.I.O. unions to which Petitioners belong.

That on August 15, 1946, the said action was quashed and dismissed, the Court's Order stating in part—

“There is indubitably a controversy between brewery worker locals on the one side and the teamster locals and the brewery companies on the other side as to who or what union is the bargaining agent of the brewery employees . . .”

That after the action was dismissed, the said C.I.O. Union called a strike and caused picket lines

to be placed around respondent brewing company in an effort to compel said respondent Brewing Company to discharge all its said employees not members of said C.I.O. Union, including veterans, and to hire only members of the said C.I.O. Union.

The strike and picket lines failed in their purpose.

/s/ P. H. McCARTHY, JR.

Subscribed and sworn to before me this 4th day of June, 1947.

[Seal]

CATHERINE E. KEITH,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires December 16, 1950. [69]

MEMORANDUM OF POINTS AND AUTHORITIES

I.

The Court is without jurisdiction.

“District Courts have only such jurisdiction as Congress confers; and Congress may change or take away any jurisdiction it has conferred, making such change operative even in pending cases . . .”

36 C.J.S., Sec. 308, page 512.

29 U.S.C.A. 104-105-113

50 App. U.S.C.A. 308 (c)

II.

The joinder of the parties appearing specially at

this stage of the proceedings and upon the terms laid down by the Court is a denial of due process and a violation of the Vth Amendment to the Constitution of the United States.

“The right to a fair and adequate hearing in which one has the right to defend his interest before an impartial court is essential to due process of law.”

16 C.J.S. Sec. 622, page 1265.

“A party has a right to cross-examine witnesses who have testified for the adverse party, and this right is absolute and not a mere privilege.”

70 C.J., Sec. 779, page 611.

III.

The Order to Show Cause and Amended Petition, and each of them, was not served in accordance with the rules of Court.

Rule 3—Local Rules of Civil Procedure.

Rule 5—Rules of Civil Procedure.

Rule 6—Rules of Civil Procedure.

IV.

The Order to Show Cause and Amended Petition, and each of them was not served within the time provided by the Order of [70] the Court.

Order to Show Cause dated May 28, 1947.

Rule 6—Rules of Civil Procedure.

V.

The Alias Summons was not served in accordance with the rules of the Court.

Rule 5—Rules of Civil Procedure.

Rule 6—Rules of Civil Procedure.

Dated June 4, 1947.

Respectfully submitted:

/s/ P. H. McCARTHY, JR.

[Endorsed]: Filed June 5, 1947. [71]

[Title of District Court and Cause.]

MOTION TO DISMISS

To: Fred Elia Iob; Samuel M. Dobbs; Waldemar F. Ullrich; James M. Carter, U. S. Attorney; Ronald Walker, Assistant U. S. Attorney, Chief of Civil Division; and James C. R. McCall, Jr., Assistant U. S. Attorney.

You and each of you, will please take notice that on the 5th day of June, 1947, at 10 o'clock, a.m., or as soon thereafter as counsel may be heard, respondent Los Angeles Brewing Company, will move the above-entitled Court as follows, to wit:

1. Dismiss petitioners' amended petition because the same fails to state a claim against this respondent for which relief can be granted.

2. To dismiss the action on the ground that this Court lacks jurisdiction; that it affirmably appears from the said petition [72] and the allegations therein contained, that a labor dispute exists between the various labor unions therein described with respect to jurisdiction over respondent Los Angeles Brewing Company employees, employed in its

brewery, bottling, checking and delivery departments; that it affirmably appears that the said respondent corporation has been involved in said labor dispute and has been picketed by certain of said unions, as more specifically set forth in said amended complaint; that it affirmably appears from petitioners' said amended complaint that this respondent has a "closed shop" agreement with the other respondent labor unions, described in petitioners' amended petition, and that the legality and existence of said agreements are being questioned by petitioners in their amended petition; that by reason of the foregoing the National Labor Relations Board has sole and exclusive jurisdiction in the premises and this Court is without jurisdiction to proceed herein or to order the injunction sought by petitioners in their order to show cause, now set for hearing in this Honorable Court on June 5, 1947, other than to dismiss the said order to show cause and said amended petition.

Said motion will be made upon the files and records of this proceeding, together with Memorandum of Points and Authorities and Affidavit of James M. McRoberts, copies of which are served upon you herewith.

Dated this 5th day of June, 1947.

HANNA AND MORTON,

By /s/ JAMES M. McROBERTS,
Attorneys for Respondent Los Angeles Brewing
Company.

[Endorsed]: Filed June 5, 1947. [73]

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES M. McROBERTS

State of California,
County of Los Angeles—ss.

James M. McRoberts, being first duly sworn, deposes and says:

That he is an attorney at law duly licensed to practice before this Honorable Court, and that he is of counsel for respondent Los Angeles Brewing Company, a corporation.

That heretofore, to wit: On or about August 1, 1946, the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO, together with various persons named as joint parties plaintiff acting as representatives of Local Unions 7 and 293 of said International Union, which said International Union and said named Locals are the same International Union of [74] United Brewery, Flour, Cereal and Soft Drink Workers of America and Locals 7 and 293 referred to in Paragraphs XI and XII, and other paragraphs of petitioners' amended petition herein, did institute proceedings in the Superior Court of the State of California, in and for the County of Los Angeles, No. 517,511; that as an ancillary to said proceedings the said unions last mentioned, plaintiffs therein, did procure a Temporary Restraining Order and Order to Show Cause against respondent corporation and other various brewing companies located in Southern California, a copy

of which said Temporary Restraining Order and Order to Show Cause is attached hereto and marked Exhibit "A."

That the said Los Angeles Brewing Company, together with other there named defendants, did make certain motions to dismiss, quash, vacate, and set aside the Summons, Complaint, and Temporary Restraining Order and Order to Show Cause, above referred to, upon various grounds, including the ground that the said Superior Court lacked jurisdiction for the reason that original jurisdiction of the subject matter of the said unions' complaint lay in the National Labor Relations Board under the National Labor Relations Act; that thereafter the Honorable Henry M. Willis, Judge of the Superior Court, did on August 15, 1946, enter a certain "Order on Motions to Quash and Dismiss," a true and correct copy of which is attached hereto and marked Exhibit "B"; that thereafter the said unions, above described, did file a notice of appeal from said Superior Court last mentioned; that pending said appeal the said Superior Court did make its "Order Maintaining Status Quo Pending Appeal," a copy of which said order is attached hereto and marked Exhibit "C"; that thereafter respondent Los Angeles Brewing Company, in conjunction with said other brewing companies, did move to vacate the same; that after a hearing an Order was made [75] by the said Honorable Judge Henry M. Willis, a copy of which said Order is attached hereto and marked Exhibit "D."

That the appeal described above was subsequently

abandoned by said International Union, notice of abandonment being filed November 15, 1946.

Dated this 5th day of June, 1947.

/s/ JAMES M. McROBERTS.

Sworn to and subscribed before me this 5th day of June, 1947.

[Seal] /s/ LAURA TEETER,
Notary Public in and for said County and State.

HANNA & MORTON,

By /s/ JAMES M. McROBERTS,
Attorneys for Respondent Los Angeles Brewing
Company. [76]

EXHIBIT "A"

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 517511

INTERNATIONAL UNION OF UNITED
BREWERY, FLOUR, CEREAL AND SOFT
DRINK WORKERS OF AMERICA, a vol-
untary unincorporated association; EUGENE
J. McCANN, individually and as International
Representative and Supervisor for California
of said International Union; GEORGE KENT;
FRITZ GREUB; JACK RUFER; AL LEI-
BACHER, individually and as members of and
representatives of Local Union No. 7 of the

International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, a voluntary unincorporated association; ARNOLD BIRD; ED MAIN, JR.; LYNN MATTESON; LEO KOZLOSKY, individually and as members and representatives of Local Union No. 227 of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, a voluntary unincorporated association; THEODORE TAYLOR; CHARLES HAGER; HOWARD VOSS; JOHN BESSENBACHER, individually and as members and representatives of Local Union 293 of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, a voluntary unincorporated association,

Plaintiffs,

vs.

ACME BREWING CO., a corporation; A.B.C. DIST. CO., a corporation; ASSOCIATED BREWERS DIST. CO., a corporation; BOHEMIAN DIST. CO., a corporation; BLAIR BEVERAGE CO., a corporation; CANADA DRY GINGER ALE, INC., a corporation; COCA-COLA CO., a corporation; DR. PEPPER BOTTLING CO., a corporation; EAST-SIDE DIST. CO., a corporation; GLOBE BOTTLING CO., a corporation; GENERAL DIST. CO., a corporation; GEO. W. PEVERLEY CO., a corporation; GRACE BROS. BREWING CO., a corporation; HOME ICE [77] &

COLD STORAGE CO., a corporation; KELLY BEVERAGE CO., a corporation; LOS ANGELES BREWING CO., a corporation; MAIER BREWING CO., a corporation; MILLER MALTING CO., a corporation; MISSION DRY CORP., a corporation; NEHI BEVERAGE CO., a corporation; PABST SALES CO., a corporation; PARK BEVERAGE #1, a corporation; PARK BEVERAGE #2, a corporation; PROGRESSIVE WHOLESALE LIQUOR CO., a corporation; PEPSI-COLA BOTTLING CO., a corporation; RAINIER BREWING CO., a corporation; STEWART McKEE & CO., a corporation; SOUTHERN CALIFORNIA BREWERS, a corporation; SHASTA WATER CO., a corporation; ZESTO BOTTLING CO., INC., a corporation; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL, a voluntary unincorporated association; EINER MOHN, individually and as International Representative for Southern California of said INTERNATIONAL BROTHERHOOD; LOCAL 893, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, a voluntary unincorporated association; HENRY JENICHEN, individually and as secretary-treasurer and chief executive officer of said Local 893; ELMER SCHAFFER, individu-

ally and as secretary-treasurer of the Los Angeles Branch of said Local 893; LOCAL 884 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, a voluntary unincorporated association; C. D. BISZANT, individually and as secretary-treasurer and chief executive officer of said Local 884; WILLIAM PAYNE, individually and as secretary of the Los Angeles Branch of said Local 884; LOCAL No. 888 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL, a voluntary unincorporated association; MARTIN CHRISTEN, individually and as Secretary and Treasurer and chief executive officer of said Local 888; LOCAL 203 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL, a voluntary unincorporated association; KENNETH NASH, individually and as secretary and chief executive officer of said Local 203; LOCAL 896 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, a voluntary unincorporated association; WILLIAM H. AHERN, individually and as secretary-treasurer and chief executive officer of said Local 896; ANTONE ZEIGLER, individually and as chief

executive officer of the Los Angeles Branches of said Local 896, DOE I, DOE II, DOE III, DOE IV, DOE V, DOE VI, DOE VII, DOE VIII, DOE IX and DOE X, voluntary unincorporated associations; DOE XI, DOE XII, DOE XIII, DOE XIV, DOE XV, DOE XVI, DOE XVII, DOE XVIII, DOE XIX, DOE XX, DOE XXI, DOE XXII, DOE XXIII, DOE XXIV and DOE XXV,

Defendants. [78]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon the reading and the filing of the verified complaint of plaintiffs in this action, and good cause appearing therefor, and it appearing that this is a proper case for an order to show cause

It Is Therefore Ordered that each of the defendants above named appear in the court room of Department 34 on the 20th floor of the City Hall, Los Angeles, California, at the hour of 9:30 a.m., on the 12th day of August, 1946,

It Is Further Ordered that the defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, defendant Local 893 of said International Brotherhood, defendant Local 896 of said International Brotherhood, defendant Local 888 of said International Brotherhood, defendant Local 203 of said International Brotherhood, defendant Local 884 of said International Brotherhood, defendants Einer Mohn, Henry Jenichen, William H. Ahern, Martin

Christen, C. D. Bissant, William Payne, Kenneth Nash and Antone Zeizler, show cause, if any they have, at the time and place aforestated why they, their agents, attorneys, servants and representatives should not be restrained and enjoined during the pendency of the action herein from directly or indirectly or by any means or device whatsoever:

a. acting or attempting to act as the exclusive representative for purposes of collective bargaining of any employees of the defendant employers listed in Paragraph XI of the verified complaint in the bottlers, brewers, checkers or drivers classifications.

b. enforcing or attempting to enforce the provisions of the Teamsters Contract, or any contract, arrangement or [79] understanding, whereby the employees of the defendant employers listed in Paragraph XI of the verified complaint in the bottlers, brewers, checkers or drivers classifications are required to become and remain members of the International Teamsters and Teamsters Locals 893, 896, 888, 884 or 203, as the case may be, as a condition of employment;

c. interfering by the use of picket lines, boycott, threats of force and violence, force or violence or by any means whatsoever with the enforcement and performance of the Brewery contract or any term or condition thereof;

d. inducing or attempting to induce by picket lines, boycott, threat of force and violence, force and violence or by any means whatsoever a breach of or failure to enforce or perform the Brewery contract or any term or condition thereof.

It Is Further Ordered that the corporate defendants named in the caption hereinabove, show cause, if any they have, at the time and place aforesated why they, their agents, attorneys, servants and representatives should not be restrained and enjoined during the pendency of the action herein from directly or indirectly or by any means whatsoever:

e. discharging or threatening to discharge any employee in the bottlers, brewers, checkers or drivers classifications or any employee covered by the Brewery contract, for failure to become or remain a member of International Teamsters and Teamsters Locals 896, 893, 888, 884 or 203, as the case may be;

f. enforcing or performing the Teamsters contract or any term or condition thereof;

g. recognizing the International Teamsters or Teamsters Locals 896, 893, 888, 884 or 203 as the exclusive representative for purposes of collective bargaining of the employees of the defendant employers listed in Paragraph XI of the verified complaint, in the bottlers, brewers, checkers and drivers classifications [80] or bargaining collectively with said International Teamsters or Teamsters Locals 896, 893, 888, 884 or 203 as such representative;

h. refusing to carry out or perform the provisions of Section 1 of the Brewery Agreement requiring all employees of said defendant employers in the bottlers, brewers, checkers and drivers classifications to become and remain members of the International Union and Locals 7, 227, 229 or 293 as

the case may be as a condition of employment, or the provisions of Section 2 of the Brewery Agreement requiring said defendant employers to obtain and hire new employees through the respective locals to which the employees in the respective classifications are required to belong, or any other term or provision of the Brewery Agreement.

It Further Appearing to the Satisfaction of the Court on reading the verified complaint of plaintiffs herein that this is a proper case for granting a temporary restraining order and that unless the temporary restraining order prayed for in said complaint be granted, great injury will result to plaintiffs before the matter can be heard on the order to show cause:

It Is Therefore Ordered that pending the hearing of this order to show cause, defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, defendant Locals 893, 896, 888, 884 and 203 of said International Brotherhood, defendants Einer Mohn, Henry Jenichen, William H. Ahern, Martin Christen, C. D. Bissant, William Payne, Kenneth Nash and Antone Zeigler, and each of them, their agents, attorneys, servants and representatives are hereby enjoined and restrained from doing or attempting to do or causing to be done either directly or indirectly or by any means, method or device any of the actions hereinabove set forth in the paragraphs lettered a, b, c and d inclusive; and that the corporate defendants named in the caption hereof and each of them, their agents, attorneys, servants and repre-

sentatives are hereby enjoined and restrained from doing or [81] attempting to do or causing to be done either directly or indirectly by any means, method or device any of the actions hereinabove set forth in the paragraphs lettered e, f, g and h inclusive.

It Is Further Ordered that a true copy of this order to show cause and temporary restraining order, memorandum of points and authorities, summons and complaint be served upon the defendants at least five days before the return of the order to show cause herein.

Dated at Los Angeles, California, this 2nd day of August, 1946.

WILLIS,

Judge of the Superior Court.

EXHIBIT "B"

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 517511

INTERNATIONAL UNION etc. et als,
Plaintiffs,

vs.

ACME BREWING CO. et als,
Defendants,

ORDER ON MOTIONS TO QUASH
AND DISMISS

Plaintiff unions, comprising four locals, claiming that there exists a collective bargaining agreement between them and defendant brewery compa-

nies, seek herein to restrain such companies and a teamsters local union No. 893 and others from interfering with the performance of such agreement. An order to show cause why a preliminary injunction should not be issued was made, and a temporary restraining order was issued on August 2, 1946, returnable on August 12, 1946. On this latter date certain defendants, in three groups, made and submitted motions to dismiss, quash, vacate and set aside the summons and complaint, temporary restraining order and the order to show cause upon the ground, among others that this court lacks jurisdiction to entertain the cause for the reason that all original jurisdiction of the subject of dispute herein lies in the National Labor Relations Board under the National Labor Relations Act, the subject of controversy being [83] admittedly the identity of the collective bargaining agent for the employees of the brewery companies.

These three motions—all similar in character and purpose—were argued at length by able counsel, and the history of the parties and their past relationships and controversies was fully revealed by affidavits and the pleadings.

There is a sharp dispute on the question of the present existence—as well as past existence—of any collective bargaining agreement between the plaintiff brewery workers unions and the brewery companies. There is indubitably a controversy between the brewery workers locals on the one side and the teamster locals and the brewery companies on the other side as to who or what union is the bargaining

agent of the brewery employees. These controversies have not been presented to the National Labor Relations Board for decision.

It seems to be clearly settled that under the facts herein relating to the character and interstate extent of the brewery companies' business operations, the National Labor Relations Board has initial exclusive jurisdiction to determine who is or shall be bargaining agent for the employees of the brewery companies herein. This conclusion finds complete support in the decision of the Circuit Court of Appeals, Ninth Circuit, rendered in 1939 in the case embracing many of the parties herein, and reported in 106 Fed. 2nd 871. Therein the court stated:

“Since both the employees and the Brewery Workers Union and also the breweries have an administrative tribunal established by Congress for the specific purpose of determining the controversy concerning the bargaining agent, the decision of that tribunal, and not the federal court, first should have been sought. *Myers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 50; *Fur Workers Union, Local No. 72 v. Fur Workers Union*, No. 21238, 70 App. D.C. 122, 105 Fed. 2nd 1, 12.”

In the case of *Adkins v. Western Pipe & Steel Co.*, No. 476502, files of this court, and reported in C.C.H. 5 Labor Cases, [84] Par. 61097, decided by the author of this opinion on May 25, 1942, I had occasion to review this subject of jurisdiction as outlined in the National Labor Relations Act, and

after citing and quoting from several cases on the point, including the federal case last above quoted from, I wrote the following comment which appears quite pertinent herein:

“I have in mind a very clear conception at this time of the line of demarkation which determines on which side the jurisdiction falls. If the action is brought by an employer, innocent of any unfair labor practice, in a court of equity, against unions charged with committing unlawful acts, the court has jurisdiction and not the Board. If the case is by a labor union through its members or officers suing in a representative capacity against an employer for relief from or to prevent unfair labor practices, the Board under the National Labor Relations Act, and the Board alone, has jurisdiction and that no court can be called upon in such case to intervene or usurp jurisdiction and power, until and unless the Board has exhausted all its remedies and there is nothing left but recourse to the courts, or a review sought as provided by the Act in a circuit court of appeals.”

From the foregoing it follows that the three motions to quash and dismiss the summons and complaint, to vacate the temporary restraining order and to discharge the order to show cause should each be granted, and

It Is So Ordered. August 15, 1946.

HENRY M. WILLIS,
Judge. [85]

EXHIBIT "C"

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 517511

INTERNATIONAL UNION OF UNITED
BREWERY, FLOUR, CEREAL AND SOFT
DRINK WORKERS OF AMERICA, a voluntary unincorporated association, EUGENE J. McCANN, individually and as International Representative and Supervisor for California of said International Union; GEORGE KENT, FRITZ GREUB, JACK RUFER, AL LEIBACHER, individually and as members of and representatives of Local Union No. 7 of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, a voluntary unincorporated association; ARNOLD BIRD, ED MAIN, JR., LYNN MATTESON, LEO KOZLOSKY, individually and as members and representatives of Local Union No. 227 of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, a voluntary unincorporated association; THEODORE TAYLOR, CHARLES HAGER, HOWARD VOSS, JOHN BESSENBACHER, individually and as members and representatives of Local Union 293 of the International Union of United Brewery, Flour,

Cereal and Soft Drink Workers of America,
a voluntary unincorporated association,

Plaintiffs,

vs.

ACME BREWING CO., a corporation, et al., etc.,
Defendants.

ORDER MAINTAINING STATUS QUO
PENDING APPEAL

It appearing to the satisfaction of this Court from the records, files and pleadings in this case that on August 15, 1946, a certain order was made and entered by this Court granting the [86] motions to dismiss the within action for lack of jurisdiction thereover in this Court, which motions were filed by the defendants Kenneth Nash, individually and as secretary of Local 203 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and said Local 203, and by the defendants, East Side Dist. Co., Los Angeles Brewing Co., a corporation, Stewart McKee & Co., a corporation, Grace Bros. Brewery, Ltd., a corporation, Acme Brewing Co., a corporation, Bohemian Distributing Co., a corporation, Maier Brewing Co., a corporation and Rainier Brewing Co., a corporation, and

It further appearing that the plaintiffs herein have filed their notice of appeal from the said order dismissing said action for lack of jurisdiction, and that said appeal is now pending, and

It appearing to the satisfaction of this Court that this is a proper case wherein this Court may invoke its power to maintain the status quo pending the determination of said appeal,

Now, Therefore, It Is Ordered, Adjudged and Decreed as Follows: That pending the determination of the appeal filed on August 19th, 1946, by the plaintiffs from that certain order entered on August 15, 1946, dismissing the within action for lack of jurisdiction thereover in this Court, the defendants East Side Dist. Co., a corporation, Los Angeles Brewing Co., a corporation, Stewart McKee & Co., a corporation, Grace Bros. Brewery, Ltd., a corporation, Acme Brewing Co., a corporation, Bohemian Distributing Co., a corporation, Maier Brewing Co., a corporation and Rainier Brewing Co., a corporation, their agents, attorneys, servants and representatives, are enjoined and restrained from:

a. discharging or threatening to discharge any employee in the bottlers, brewers, checkers or drivers classifications or any employee covered by the Brewery Contract, [87] for failure to become or remain a member of International Teamsters and Teamsters Locals 896, 893, 888, 884 or 203, as the case may be;

b. enforcing or performing the Teamsters Contract or any term or condition thereof;

c. recognizing the International Teamsters or Teamsters Locals 896, 893, 888 or 203 as the exclusive representative for purposes of collective bargaining of the employees of the defendant employers listed in Paragraph XI of the verified complaint.

in the bottlers, brewers, checkers and drivers classifications or bargaining collectively with said International Teamsters or Teamsters Locals 896, 893, 888, 884 or 203 as such representative;

d. refusing to carry out or perform the provisions of Section 1 of the Brewery Agreement requiring all employees of said defendant employers in the bottlers, brewers, checkers and drivers classifications to become and remain members of the International Union and Locals 7, 227, 229 or 293, as the case may be, as a condition of employment, or the provisions of Section 2 of the Brewery Agreement requiring said defendant employers to obtain and hire new employees through the respective locals to which the employees in the respective classifications are required to belong, or any other term or provision of the Brewery Agreement.

It Is Further Ordered, Adjudged and Decreed that pending the determination of the aforesaid appeal, the defendants Kenneth Nash, individually and as Secretary of Local 203 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and Local 203 be and they hereby enjoined and restrained from

a. acting or attempting to act as the exclusive representative for purposes of collective bargaining of any employees of the defendant employers listed in Paragraph XI of the verified complaint in the bottlers, brewers, checkers or drivers classifications,

b. enforcing or attempting to enforce the provisions of the Teamsters Contract, or any contract,

arrangement or understanding, whereby the employees of the defendant employers listed in Paragraph XI of the verified complaint in the bottlers, brewers, checkers or drivers classifications are required to become and remain members of the International Teamsters and Teamsters Locals 893, 896, 888, 884 or 203, as the case may be, as a condition of employment;

c. interfering by the use of picket lines, boycott, threats of force and violence, force or violence or by any means whatsoever with the enforcement and performance of the Brewery Contract or any term or condition thereof;

d. inducing or attempting to induce by picket lines, boycott, threat of force and violence, force and violence or by any means whatsoever a breach of or failure to enforce or perform the Brewery Contract or any term or condition thereof.

The foregoing shall become effective upon the filing of a bond by the plaintiff in the amount of \$1000.00.

Dated, August 19th, 1946.

/s/ WILLIS,
Judge.

EXHIBIT "D"

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 517,511

INTERNATIONAL UNION, etc., et als,
Plaintiffs,

vs.

ACME BREWING CO., et als,
Defendants.

ORDER

The chief controversy in the action arises from a dispute as to what labor union is the bargaining agent of the employees of defendant employers, each of two groups of local unions claiming to have a bargaining agreement in writing in each of which a closed shop provision is included. An order to show cause and a temporary restraining order were made on August 2, 1946, returnable August 12th, on which date the court entertained and took under submission motions of three groups of defendants to quash the summons, dismiss the complaint and dissolve and discharge the temporary restraining order and the order to show cause.

On August 15, 1946, by minute order, these motions were granted on the ground that the court lacked jurisdiction of the subject matter. On August 19th plaintiffs filed notice of appeal from this order of dismissal, and thereafter on the same day an order was signed by the judge in chambers, purposed to maintain the status quo pending such

appeal. On August 20, 1946, the [90] defendants affected by this latter order moved to vacate the same. This motion was made and heard in open court, argued at length and submitted.

After careful consideration it has finally dawned upon the mental horizon of the judge of this department that no order maintaining the status quo (ordinarily within the powers of a court of equity,—*City of Pasadena v. Superior Court*, 157 Cal. 781; *Pierce v. City of Los Angeles*, 159 Cal. 516; *Merri-mack River Sav. Bank v. Claycenter*, 219 U. S. 527) can be made in this particular case without the court first ascertaining and deciding what is the status quo. This the court has no power to do as it lacks jurisdiction of the subject matter. Any order purporting to preserve the status quo would constitute a preliminary or interlocutory order determining which of the alleged bargaining agreements was in existence and which predominated at the date of filing this action. A reading of the order under attack will reveal the truth of the foregoing statement. It contains matter and positive directions to control the action of the employers in anticipation of a decision which this court has held it has no jurisdiction to make. An order to maintain a status quo is essentially one of a negative nature—a negation—not positive and in effect controlling conduct so as to change a status quo as claimed by one party to a status desired by the other party.

The status quo in this case consists in the dispute as to which of the two groups of local unions

has a written agreement in force and continuing effect. It has been decided herein that the National Labor Relations Board has initial exclusive jurisdiction to decide that dispute. This court has no power to do by indirection what it cannot do directly. It follows that no order attempting or purposing to maintain a status quo can be entered herein. The order made on August 19th is vacated.

Dated, August 21, 1946.

HENRY M. WILLIS,

Judge. [91]

[Endorsed]: Filed June 5, 1947. [93]

At a stated term, to wit: The February Term, A.D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Saturday, the 7th day of June, in the year of our Lord one thousand nine hundred and forty-seven.

Present:

The Honorable: Paul J. McCormick, District Judge.

No. 6322—M Civil

FRED ELIA IOB, et al.,

Petitioners,

vs.

L. A. BREWING CO., INC., a Corp., et al.,

Respondents.

This cause coming on for further hearing order to

show cause why the petitioners should not be restored to former positions, without loss of seniority; James C. R. McCall, Jr., Assistant U. S. Attorney, appearing as counsel for the petitioners; James M. McRoberts, Esq., appearing as counsel for respondent Los Angeles Brewing Co.; P. H. McCarthy, Jr., Esq., appearing as counsel for respondents Brewers, Maltsters & Yeast Workers Local Union 893 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Thomas Vacca and J. S. Allwine:

Attorney McCarthy makes a statement, Attorney McCall makes a statement, the Court makes a statement, and Attorney McCarthy states he has authorization to enter an appearance for respondents Joint Local Executive Board of California, and Bottlers Local Union 896, and adopting paragraphs 1, 2, and 3 of the motion of respondents Local Union 893, et al., filed heretofore.

Attorneys McCall and Roberts state they have no objection to the appearance of these two entities on this basis and it is ordered to proceed.

Attorney McCarthy argues for the said respondents in support of their motions in opposition to the Court's jurisdiction. The Court makes a statement that there is a question as to whether there is a labor dispute under the record of this case. Attorney McCarthy continues argument. At 11:25 a.m. court recesses.

At 11:35 a.m. Court reconvenes herein and all being present as before, Attorney McCall argues

to the Court for the petitioners. [92] Attorney McRoberts argues for respondent L. A. Brewing Co. in opposition to petitioners' argument. The Court makes a statement and reads excerpts from transcript. Attorney McCarthy makes a further statement in behalf of respondents, et al. Attorney McCall argues further for the petitioners.

The Court rules it has jurisdiction in this case and overrules and denies objection of movants to jurisdiction of the Court; Attorney McCall is directed to prepare written judgment of dismissal of motions on question of jurisdiction. The Court further rules that the injunction requested will not issue at this time and allows Attorney McCarthy until 10 a.m., June 10, 1947, to file answering affidavits in support of respondent unions re Order to Show Cause, at which time the Court will issue injunction in accordance with its finding that the petitioners were unlawfully discharged and are entitled to their positions (unless said affidavits remove conclusion which Court has arrived at) upon application therefor by petitioners.

Attorney McRoberts inquires about proposed objections to interrogatories to respondent Los Angeles Brewing Co. and Court states they may be heard by another judge, if necessary.

In the District Court of the United States in and for
the Southern District of California, Central
Division

No. 6322-M Civil

FRED ELIA IOB, et al.,

Petitioners,

vs.

LOS ANGELES BREWING CO., INC., a corpora-
tion, et al.,

Respondents.

ANSWER OF ADDITIONAL RESPONDENTS,
THE JOINT LOCAL EXECUTIVE BOARD
OF CALIFORNIA; BOTTLERS' LOCAL
UNION NO. 896 OF THE INTERNA-
TIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS OF AMERICA; AN-
THONY ZEIGLER, BREWERS, MALT-
STERS & YEAST WORKERS LOCAL UN-
ION NO. 893 OF THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA; THOMAS
VACCA AND J. S. ALLWINE. [224]

Come Now the additional respondents and for
their Answer deny and allege as follows, to-wit:

First Defense.

Petition fails to state a claim against said addi-
tional respondents upon which relief can be
granted.

Second Defense.

The Court has no jurisdiction over the subject matter of the action.

Third Defense.

The joinder of the additional respondents at this stage of the proceedings and upon the terms laid down by the Court as to each said additional respondent is a denial of due process and a violation of the Fifth Amendment to the Constitution of the United States.

Fourth Defense.

Answering paragraphs I to VIII of the Petition incorporated by reference in Amended Petition as Paragraphs I-VIII:

I.

Additional respondents admit the allegations of paragraph II of said Petition, and in connection therewith do further allege that respondent does ship malt beverage products, as well as alcoholic beverages and wines, to various adjacent states and territories, and does in addition purchase various materials, goods, wares, and merchandise without the State of California, which said materials, goods, wares, and merchandise are shipped to the respondent within the State of California, and products of respondent are shipped out of the State of California, all in substantial quantities and of substantial value.

II.

Answering paragraph III of the within Petition, additional respondents admit each and every allega-

tion therein contained, save and except additional respondents deny that each petitioner [225] was re-employed by reason of any requirement of law, and in connection therewith do allege that said petitioners, or each of them, were re-employed without reference to any requirement of law, and that each of them were referred to respondent by the particular labor union with which the petitioners were then affiliated and were cleared for re-employment by said labor unions, and did re-enter respondent's employment in the year 1946 after the honorable discharge of each petitioner from the United States armed services.

III.

Answering paragraph IV of the within petition, additional respondents deny generally and specifically each and every allegation therein contained, and the whole thereof.

Further answering said paragraph IV, respondent alleges that the said named petitioners, to-wit; Samuel M. Dobbs and Waldemar F. Ullrich, did on or about September 21, 1946, of their own volition voluntarily terminate their employment by and with the respondent, and that said named petitioners have not thereafter applied for re-entrance to respondent's employment.

IV.

Answering paragraph V of the within petition, additional respondents deny generally and specifically each and every allegation therein contained, except so much thereof as may be construed to al-

lege that since November 25, 1946, respondent has declined and refused to accept as an employee said Fred E. Iob by reason of said petitioner's refusal to comply with the terms and conditions of that certain Agreement, a copy of which is attached hereto, made a part hereof, and marked Exhibit "A", particularly Section 1(a) thereof.

Further answering said paragraph V, respondent alleges that it did make and enter into a certain collective bargaining agreement (said Exhibit "A") governing wages, rates of pay, hours [226] of labor, and other conditions of employment on the 28th day of July, 1946, with the Joint Local Executive Board of California, a labor organization, under and pursuant to the provisions of 49 U. S. Stats. 452, 29 U. S. C. A., 151, Section 1, et seq., which said Agreement has been in full force and effect from July 28, 1946, and still continues in effect as modified by that certain Agreement of April 1, 1947, a copy of which is attached hereto, made a part hereof, and marked Exhibit "B".

Further answering said paragraph V of the within petition, additional respondents allege that said petitioner Fred E. Iob has on more than one occasion prior to said September 9, 1946, and November 25, 1946, been offered by the representative of said Joint Local Executive Board of California, and Local Union No. 893 of said Joint Local Executive Board of California; the opportunity of joining and becoming a member of said Local Union No. 893.

V.

Answering paragraph VI of the within petition, additional respondents deny generally and specifically each and every allegation therein contained, except as hereafter alleged, and additional respondents allege that the statistical facts concerning each individual petitioner's employment are as follows:

	Samuel M. Dobbs Bottler	Waldemar F. Ulrich Bottler	Fred E. Iob Brewer
Position held			
Date first entered employment	July 29, 1937	Feb., 1937	Mar. 8, 1943
Date of termination to enter U. S. Armed forces	Jan. 17, 1942	May 9, 1942	Feb. 24, 1943
Date of entry on active duty in U.S. Armed forces	Jan. 9, 1942	May 9, 1942	Mar. 9, 1945
Date of discharge therefrom	Nov. 30, 1945	Feb. 8, 1946	July 20, 1946
Date of reentry into respondent's em- ployment	Jan. 2, 1946	Apr. 29, 1946	(1) Sept. 9, 1946
Hourly Wage Rate (Respondent's Exhibit "A")	\$1.36	\$1.36	\$1.48
Weekly Wage Rate (Respondent's Exhibit "A")	\$54.50	\$54.50	\$59.00
Termination of Employment	Sept. 21, 1946	Sept. 21, 1946	(1) Sept. 17, 1946 (2) Nov. 25, 1946
Weekly loss of wages so caused	None	None	None
Loss of wages to date..	None	None	None
Weekly rate of future loss	None	None	None

VI.

Answering paragraph VII of the within petition, additional respondents deny each and every all and

singular the allegations therein contained, except so much of said paragraph as may be construed to allege that respondent insisted that it could only conduct its business and have in its employ in the departments covered by Exhibit "A" those persons who had complied with the provisions of said Exhibit "A".

VII.

Answering paragraph VIII of the within petition, additional respondents deny each and every all and singular the allegations therein contained, except insofar as Exhibit "A" may provide for a system or practice of seniority.

VIII.

Answering paragraph IX of Petitioners' Amended Petition, additional respondents admit each and every allegation therein contained, save and except additional respondents deny that the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America is an unincorporated International [228] Labor Union and allege that the true name of said International Labor Union is International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America. Deny that Local Unions Nos. 896 and 893 were "chartered by said Teamster International on or about July 28, 1946" and allege the true facts to be that the said Labor Unions are the successors in interest to Bottlers Local Union No. 293 and Brewers, Maltsters and Yeast Workers Local Union No. 7 of the International Union of

United Brewery, Flour, Cereal and Soft Drink Workers of America, suspended A. F. of L. affiliate, subject to the terms and conditions of that certain Agreement entered into by and between said locals and other locals of said International and The Joint Local Executive Board of California and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America dated July 25, 1946, a copy of which is attached hereto, made a part hereof and marked Exhibit "C." Deny that the individual additional respondents are officers of said local labor unions in the capacity stated in the caption or at all. Deny that additional respondent, The Joint Local Executive Board of California, is composed of representatives of various local labor unions of the Teamsters International, except insofar as provided for in said Agreement, Exhibit "C." Deny that said The Joint Local Executive Board of California acts as Collective Bargaining Agent for Teamster Locals whose members are employed by California breweries, including Teamster Locals Nos. 896 and 893. Alleges the said The Joint Local Executive Board of California is the representative for collective bargaining for all of the employees employed in the Brewing, Bottling and Delivery Departments of the respondent Brewing Company under and pursuant to the provisions of 49 U. S. Stats, 452, 29 U.S.C.A. 151 Sec. 1 et seq.

IX.

Answering paragraph X of Petitioners' Amend-

ed Petition, [229] additional respondents deny each and every, all and singular, the allegations, words and figures thereof, in said paragraph contained and allege the facts to be——

That on March 4, 1887, the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, affiliated with the American Federation of Labor under the name Brewers National Union and on June 1, 1907, its affiliation was revoked and on February 25, 1908, its affiliation was reinstated and in 1933 the convention of the American Federation of Labor adopted an opinion and decision of the Executive Council of the American Federation of Labor which reads as follows:

“In the case of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, vs. The International Union of the United Brewery, Flour, Cereal and Soft Drink Workers of America, the Executive Council is of the opinion and decides that teamsters and chauffeurs in the brewery industry properly belong to and come under the jurisdiction of the International Brotherhood of Teamsters and Chauffeurs.”

The International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America challenged the right, power and authority of the American Federation of Labor to give such opinion and make such decision and instituted an action in the District Court of the United States for the

District of Columbia and on March 17, 1941, the United States Court of Appeals for the District of Columbia entered its opinion and order denying the contention of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America and sustaining the right, power and authority of the American Federation of Labor to give such decision in *Green v. Obergfell*, 121 Fed. (2d) 46. [230]

Shortly thereafter in the 1941 convention of the American Federation of Labor in Seattle, Washington, the American Federation of Labor suspended the affiliation of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America for failing and refusing to comply with said opinion and decision of its 1933 Convention in conformity with the order of the 1939 Convention.

That at no time since its reinstatement in 1908 has the affiliation of the said International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America with the American Federation of Labor been revoked, nor has said International Union been expelled nor has it resigned or in any other manner terminated its affiliation with the American Federation of Labor.

That since 1941 the said International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America continued to operate as a suspended International affiliate of the American Federation of Labor. However, in 1946 without any provision therefor being made in the Constitution

of said International Union, a copy of which is attached hereto, made a part hereof and marked Exhibit "D," a Special Conference was called at Cincinnati, Ohio. That said "Special Conference," without any provision therefor being made in the said Constitution of said International and contrary to and in violation of the provision of said Constitution of said International, by a vote of 128 to 117, ordered a referendum vote of the membership of said International Union to be taken on the question:

"Shall the International Union Affiliate with the C.I.O."

That thereafter, contrary to and in violation of said Constitution of said International and without any provision therefor being made in said Constitution, a referendum vote was taken, 22,933 voting in favor of question presented and 19,241 [231] voting against the question presented. However, California through said Local 7 voted 90-Yes and 450-No, said Local 293 voted 171-Yes and 1511-No, said Local 229 voted 5-Yes and 28-No, and said Local 227 voted 83-Yes and 548-No. The proposal to affiliate with the C.I.O. was rejected in California, the total vote being 349 in favor of affiliating with the C.I.O. and 2537 against affiliating with the C.I.O.

That after said referendum was taken without any constitutional provision therefor and contrary to, and in violation of, said Constitution of said International, a majority of the General Executive

Board members of said International applied for and received a charter on July 18, 1946, from the Congress of Industrial Organizations (C.I.O.).

That thereafter, on July 25, 1946, the said Agreement with the International Brotherhood of Teamsters, Exhibit "C," was made, executed and delivered.

That at its convention of said International Union of the C.I.O. held at Galveston, Texas, from September 9, 1946, to September 14, 1946, inclusive, said International Union of the C.I.O., known as International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, affiliated with the C.I.O.

X.

Answering paragraph XI of said Amended Petition, additional respondents deny the allegations in said paragraph contained and allege that until on or about the year 1933, respondent company was required by virtue of the terms and conditions of collective bargaining agreement then in existence to employ in its bottling department only members in good standing of Local No. 293 of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, affiliated with the American Federation of Labor, and in its brewing department only [232] members in good standing of Local No. 7 of said International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, affiliated with the said American Federation of Labor.

That from on or about 1933 to on or about 1939, said requirements were continued by reason of certain status quo agreement entered into by and between said International Union affiliated with the American Federation of Labor and the breweries in Northern and Southern California, including the respondent company.

That on or about 1939 said requirements were continued in full force and effect by reason of certain Working Rules promulgated by The Joint Local Executive Board of California for the breweries in Southern California and another set of such Working Rules for the breweries in Northern California.

That said International Union and said The Joint Local Executive Board of California attempted by proceedings before the National Labor Relations Board to compel the said respondent company and other breweries to sign said Working Rules and thereby conduct said operations by virtue of a signed agreement.

Said International and said The Joint Local Executive Board of California were unsuccessful in said attempt.

That thereafter, proceedings were had before the War Labor Board in an attempt to compel the employees to enter into closed shop agreements, which said proceedings were likewise unsuccessful, the Board, however, ordering the employers, including the respondent company to continue to operate in the future as they had in the past under said Working Rules.

That said proceedings before the National War Labor Board were instituted first against the breweries in Northern California and by agreement the breweries in Southern California, including the respondent company, agreed to be bound by said order.

That thereafter, on or about July 28, 1946, the breweries in Southern California, including the respondent company, entered into a collective bargaining agreement with the said The Joint Local Executive Board of California, copy of which is attached hereto, made a part hereof and marked Exhibit "A" wherein and whereby the employees in the bottling department were required to be members of said additional respondent Local Union No. 896, and the brewers members of said additional respondents Local Union No. 893.

That the petitioners are not now and have not from the beginning of their original employment with the company been members in good standing of International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America or any appropriate local union of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America.

That on or about the 18th day of July, 1946, the petitioners joined and ever since and now are members of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, chartered by the Congress of Industrial Organizations on July 18, 1946.

That prior to the chartering by the C.I.O. of

said International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers Union on the 18th day of July, 1946, the said petitioners were members in good standing of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, a suspended affiliate of the American Federation of Labor and the appropriate locals thereof.

XI.

Answering paragraph XII of Amended Petition, additional respondents admit each and every allegation therein contained, save and except additional respondents deny that they have any interest in whether or not petitioners were restored to their former positions by the company, except insofar as such restoration would constitute a breach of the contracts, copies of which are attached hereto as Exhibits "A" and "B" by the company and the denial to the employees of said respondent company of their rights under the provisions of 49 U.S. Stats. 452, 29 U.S.C.A. 151 Sec. 1 and 47 U.S. Stats. 70, 29 U.S.C.A. 101 et seq.

Deny that additional respondents caused the company to discharge the petitioners, except as hereinbefore set out by insisting upon the compliance with the said agreements Exhibits "A" and "B" hereof and upon the refusal of said petitioners to comply with or to take any steps to comply with the terms and conditions of said agreements.

Deny that the respondent company entered into a purported closed shop contract and allege the

company entered into a valid, binding and subsisting closed shop agreement, copy of which is attached hereto and marked Exhibit "A" and that thereafter, a valid, binding and subsisting closed shop agreement was entered into by the company and The Joint Local Executive Board of California, copy of which is attached hereto and marked Exhibit "B."

XI.

That said paragraph XII recites:

"A copy of said contract of July 28, 1946, is attached as Exhibit 'A' to the Answer of respondent company filed herein on February 18, 1947."

That no copy of said Answer has been served upon the additional respondents and said additional respondents allege that they and each of them are therefore without knowledge or information to form a belief as to the truth of said allegation and they and each of them deny said allegation.

XII.

Answering paragraph XIII of Petitioners Amended Petition, additional respondents admit each and every allegation therein contained, save and except additional respondents deny that said petitioners would be obligated to pay admission fees and further deny their re-employment rates would adversely affect by said company's new requirement that they become members of said Team-

sters Local Union as a consideration of continued employment in their former positions and allege the true facts to be that membership in said Teamster Local Unions as a consideration of employment is a requirement imposed upon said petitioners by their fellow employees and not the company acting under and pursuant to the rights guaranteed said fellow employees by the provisions of 49 U.S. Stats. 452, 29 U.S.C.A. 151, et seq. And further deny that any discharges occurred by reason of any purported closed shop contract or by reason of the failure of any applicant to be successfully admitted to membership in said Teamsters Locals 896 or 893 and allege the true facts to be that insofar as those who were employed as of the date of said closed shop agreement, Exhibit "A" hereof, dated July 28, 1946, no person has been discharged because of failure to gain admission into either said Teamster Locals 896 or 893 and that in truth and in fact, certain C.I.O. strikers hereinbefore referred to, not only in Southern California but in Northern California, have upon application for membership been accepted into membership and employed in the brewing industry.

XIII.

Answering paragraph XIV of Petitioners Amended Petition, additional respondents deny each and every allegation, words and figures thereof contained in said paragraph, except so much thereof as alleges:

"All eight of said respondents have con-

strued [236] and applied said July 28, 1946, contract as a 'closed shop' agreement, effective at once against all bottlers and brewers in the Company's employ, who might not be members of said Teamsters Locals 896 or 893, including returned veterans of the armed forces during the reemployment year provided for in Section 8 of the Selective Training and Service Act of 1940."

and allege further that not only have all eight of said respondents, including said additional respondents, so construed said contract, but so have all employers engaged in the brewing industry in the State of California signatories to Exhibit "B," being 80 or more in number and except so much thereof as states:

"... the National Labor Relations Board had not certified the Teamsters Council as the collective bargaining agent for any portion of the Company employees ..."

and alleges further that under and pursuant to the provisions of the National Labor Relations Act, 49 U.S. Stats. 452, 29 U.S.C.A. 151 et. seq., a certification by the National Labor Relations Board is not necessary to impose upon the employer the duty and obligation to bargain with the designated and selected representative of the majority of its employees and *except* "that said Board had not, and did not, prior to December, 1946, determine what unit of the Company's employees might be a proper unit for collective bargaining with the Com-

pany, through such Teamster Council" and alleges further that in National Labor Relations Board cases numbered 21-R-3564 to and including 21-R-3570 and 21-R-3697, being *Acme, et al., v. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, C.I.O.*, the said National Labor Relations Board did find the unit covered by the contract, Exhibit "A," dated July 28, 1946, an [237] appropriate unit for collective bargaining.

XIV.

Answering paragraph XV of Petitioners Amended Petition, additional respondents deny each and every, all and singular, words and figures thereof the allegations in said paragraph contained and allege the true facts to be, the re-employment of Petitioner Iob on September 9, 1946, was the result either of a fraud perpetrated on the said Elmer Schaffer, then Secretary of the Los Angeles branch of said Teamsters Local No. 893 or as a result of a mistaken misunderstanding on the part of the said Elmer Schaffer.

That at the time of the re-employment of the said petitioner Iob, it was represented to the said Elmer Schaffer that a Court Order directing and compelling the re-employment of the said petitioner Iob had been obtained and that he of necessity must consent to the re-employment of the said petitioner Iob.

That in addition to the general denial hereinabove

set out, additional respondents deny specifically that said Local No. 893 recognized and agreed prior to November 25, 1946, that petitioner Iob as a returned veteran of the armed forces was by law entitled to be re-employed and retained in his position as a brewer for the company for a year, notwithstanding his failure to become a member of said Teamsters Local No. 893, and alleges the true facts to be that the said petitioner Iob was entitled by law to be re-employed and retained in his position as a brewer by the company for one year so long as he complied with the terms and conditions of the collective bargaining agreement in effect at the time of his re-employment and during the period of his re-employment, provided, however, that if a condition of said collective bargaining agreement was membership in a certain union that membership must be granted to said petitioner upon the same [238] terms and conditions as it would have granted to any other applicant and that said petitioner may not be discriminated against by reason of his absence in the armed forces in defense of his country. [239]

XV.

Answering paragraph XVI of petitioners' Amended Petition additional respondents deny that Petitioners Dobb and Ullrich were prevented from working between September 21, 1946, and October 5, 1946, by the fact that on September 21, 1946, strike was called against the company by the International Union of United Brewery, Flour,

Cereal, Soft Drink and Distillery Workers Union of America affiliated with the C.I.O. and its Locals 296 and 297 and other C.I.O. locals although additional respondents admit that such strike was called and further, the additional respondents deny that said strike was in protest against the firing of bottlers and brewers who had not joined Local 896 and 893 since July 25, 1946, and allege the true facts to be that said strike was called in an attempt to compel the employer to negotiate with said C.I.O. International and local unions and to discharge all employees of said employer who were members of A.F.L. and further, said additional respondents deny that said Petitioners Dobb and Ullrich were prevented from working by the establishment and maintenance of a picket line by said C.I.O. local union at the entrance to the company brewery and allege the true facts to be that the said Petitioners Dobb and Ullrich respected said picket line because of the fact that they were parties to the placing of said picket line around said brewery and parties to the calling of said strike and in addition thereto, some 293 employees of said company's brewery, being practically all of the employees of said company's brewery, repeatedly passed and re-passed, crossed and re-crossed said picket line of the C.I.O. to operate said brewery. Said additional respondents admit that said picket line may have been maintained until March 26, 1947, and may have been discontinued since that date for the reason that they and their members having at all times ignored it, no particular check was made as to the date of its

formal dissolution; and further, additional respondents allege that they and each of them are without knowledge or [240] information sufficient to form a belief as to the truth of the allegations contained in the last three sentences in said paragraph and deny each and every allegation in said last three sentences contained.

XVI.

Answering paragraph XVII of petitioners' Amended Petition additional respondents allege that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the allegations concerning alleged conversations with the superintendent of said company's brewery contained in said paragraph and therefore deny each and every such allegation therein contained; and further, answering said portion of said paragraph said additional respondents allege that on November 14, 1946, a notification of the termination of said strike and the request for re-employment of the strikers was made by the said International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.I.O. under the name International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, copy of which is attached hereto, made a part hereof and marked Exhibit "E"; and further, additional respondents insofar as the allegations concerning conversations with one Anthony Zeigler, secretary of the Los Angeles Branch of Bottlers Local Union # 896 are

concerned, said additional respondents deny each and every, all and singular the said allegations; and further, said additional respondents deny each and every, all and singular the other allegations in said paragraph contained.

XVII.

Answering paragraph XVIII of said petitioners' Amended Petition, additional respondents and each of them deny each and every, all and singular, the allegations, words and figures thereof in said paragraph contained. [241]

Fifth Defense

The Court has no jurisdiction pursuant to 38 U.S. Stats. 738, 29 U.S.C.A. 52, 53; 47 U.S. Stats. 70, 29 U.S.C.A. 101 to and including 115 by reason of the existence of a labor dispute.

Sixth Defense

The petitioners in the instance case are without clean hands in that they were parties to that certain action instituted by the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, C.I.O., Local 227 of said C.I.O. International and Local 7 of said C.I.O. International and other locals of said C.I.O. International on behalf of all of the members of said Local 227 and Local 7 including the petitioners herein in the Superior Court of the State of California in and for the County of Los Angeles titled International Union of United Brewery, Flour, Cereal and Soft

Drink Workers of America, an unincorporated association, et al., v. Acme Brewing Company, et al., numbered 517511 therein, wherein and whereby said plaintiffs for and on behalf of said petitioners and others sought to obtain from the Superior Court of the State of California a temporary and permanent injunction discharging all employees, veteran and non-veteran, in the breweries in Southern California including the respondent company's brewery who were not members in good standing in said C.I.O. International and locals or who refused to be or become members of said C.I.O. International and said C.I.O. locals and said petitioners are without equity.

Seventh Defense

That said petitioners seek to enjoy the benefits of the collective bargaining contracts between the additional respondent, Joint Local Executive Board of California, and the brewery employers including said respondent brewery company including an \$8.00 per week increase in wages negotiated by said additional respondent, Joint Local Executive Board of California in December, 1946, and [242] the other and additional benefits negotiated and obtained for the employees in said California breweries including respondent company brewery by the Agreement Exhibit "B" effective April 1, 1947, at the same time refusing to accept its burdens, i.e., membership in said A.F.L. unions, and said petitioners are therefore without equity.

Wherefore, said additional respondents pray that

petitioners' petition be dismissed and that said additional respondents go hence with their costs.

/s/ P. H. McCARTHY, JR.,
Attorney for Answering
Additional Respondents.

Received copy 6/10/47, J. M. McRoberts, Attorney, representing L. A. Brewing Company.

Received copy in U. S. Attorney's office 6/10/47, Gertrude M. Johnson. [243]

State of California,
City and County of San Francisco—ss.

Wm. H. Ahern, being duly sworn deposes and says: That he is Secretary of Bottlers Local No. 896 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; that he has read the foregoing "Answer of Additional Respondents, The Joint Local Executive Board of California; Bottlers' Local Union No. 896 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Anthony Zeigler, Brewers, Maltsters & Yeast Workers Local Union No. 893 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Thomas Vacca and J. S. Allwine" and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information or belief and as to those matters he believes it to be true.

/s/ WM. H. AHERN.

Subscribed and sworn to before me this 9th day of June, 1947.

[Seal] /s/ CATHERINE E. KEITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires December 16, 1950.

[Endorsed]: Filed June 10, 1947. [244]

[Title of District Court and Cause.]

ANSWER OF RESPONDENT LOS ANGELES
BREWING COMPANY, A CORPORATION,
REFERRED TO HEREIN AS LOS AN-
GELES BREWING COMPANY, INC.

Comes now the respondent Los Angeles Brewing Company, and for its answer to petitioners' amended petition denies and alleges as follows, to wit:

I.

Respondent hereby adopts and incorporates herein by reference, with the same force and effect as if set forth herein in full, each and all of its answers and allegations made to paragraphs I to VIII inclusive, of petitioners' original petition filed herein on January 23, 1947, to wit: paragraphs I to VII inclusive, of respondent's answer of said original petition filed herein on February 17, 1947.

II.

Answering paragraph IX of petitioners' amended

petition, respondent alleges that it has no information or belief sufficient to enable it to answer either or any of the allegations contained therein, and basing its denial on that ground denies each and several of the allegations contained in said paragraph IX, save and except respondent admits that the International Brotherhood of Teamster, Chauffeurs, Warehousemen and Helpers of America is an unincorporated international labor union, which from time to time issues charters to and recalls them from various local labor unions functioning under its jurisdiction, and that said international union is more familiarly known as the "Teamsters International." Respondent further admits that the various local unions referred to in said paragraph IX, are unincorporated labor unions chartered by the said Teamsters International. Respondent further admits that the respondent Joint Local Executive Board of California is composed of representatives of various local labor unions of Teamsters International, and that it acts as a collective bargaining agent for Teamsters Locals 896 and 893 whose members are employed in California breweries.

III.

Answering paragraph X of petitioners' amended petition, respondent alleges that it has no information or belief sufficient to enable it to answer either or any of the allegations contained therein, and basing its denial on said ground denies each and every allegation therein.

IV.

Answering paragraph XI of said amended petition, respondent denies the allegations in said paragraph contained and alleges that until on or about the year 1933, respondent Los Angeles Brewing Company was required by virtue of the terms and conditions of [361] collective bargaining agreement then in existence to employ in its bottling department only members in good standing of Local No. 293 of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, affiliated with the American Federation of Labor, and in its brewing department only members in good standing of Local No. 7 of said International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, affiliated with the said American Federation of Labor; that from on or about 1933 to on or about 1939, said requirements were continued by reason of certain status quo agreement entered into by and between said International Union affiliated with the American Federation of Labor and the breweries in Northern and Southern California, including the respondent Los Angeles Brewing Company; that on or about 1939 said requirements were continued in full force and effect by reason of certain working rules promulgated by the Joint Local Executive Board of California for the breweries in Southern California, and another set of such working rules for the breweries in Northern California.

That said International Union and said Joint

Local Executive Board of California, attempted by proceedings before the National Labor Relations Board to compel the said respondent Los Angeles Brewing Company, and other breweries, to sign said working rules and thereby conduct said operations by virtue of a signed agreement; that the said International and the said Joint Local Executive Board of California were unsuccessful in said attempt; that thereafter, proceedings were had before the War Labor Board in an attempt to compel the employees to enter into closed shop agreements, which said proceedings were likewise unsuccessful, the Board, however, ordering the employers, including respondent Los Angeles Brewing Company, to continue to operate in the future as they had in the past under said working rules; that said proceedings [362] before the National War Labor Board were instituted first against the breweries in Northern California and by agreement the breweries in Southern California, including respondent Los Angeles Brewing Company, agreed to be bound by said order; that thereafter, on or about July 28, 1946, the breweries in Southern California, including respondent Los Angeles Brewing Company, entered into a collective bargaining agreement with the said Joint Local Executive Board of California, copy of which is attached hereto, made a part hereof, and marked Exhibit "A," wherein and whereby the employees in the bottling department were required to be members of said additional respondent Local Union No. 896, and the brewers

members of said additional respondent Local Union No. 893.

This respondent is informed and believes, and upon such information and belief alleges that the petitioners are not now, and have not from the beginning of their original employment with the respondent Los Angeles Brewing Company, been members in good standing of International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America or any appropriate local union of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America.

This respondent is informed and believes, and upon such information and belief alleges that on or about the 18th day of July, 1946, the petitioners joined and ever since and now are members of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, chartered by the Congress of Industrial Organizations on July 18, 1946.

This respondent is informed and believes, and upon such information and belief alleges that prior to the chartering by the CIO of said International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers Union on the 18th day of July, 1946, the said petitioners were members in good standing of the [363] International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, a suspended affiliate of the American Federation of Labor, and the appropriate locals thereof.

V.

Answering paragraph XII of said amended petition, this respondent admits that the said added respondents caused this respondent company to discharge the petitioner Fred Elia Iob on the dates claimed by the petitioners as being the dates for said discharge, by insisting upon the compliance by this respondent of its agreement with the said respondent Joint Local Executive Board of California requiring that all of respondent's employees in its brewery department be members in good standing of said Joint Local Executive Board of California, and Local No. 893 thereof. Further answering said paragraph XII this respondent denies that it entered into a purported "closed shop" contract as alleged in said paragraph, but does allege that it did enter into a valid, joint and subsisting agreement with the Joint Local Executive Board of California and Locals 893 and 896, a copy of which said agreement is attached to this answer and marked Exhibit "A"; that thereafter a valid, joint and subsisting closed shop agreement was entered into by this respondent and the Joint Local Executive Board of California and Locals 893 and 896, as of April 1, 1947, a copy of which said agreement is attached hereto and marked Exhibit "B." Further answering said paragraph this respondent alleges that it has no information or belief sufficient to enable it to answer said remaining allegations, and deny the same and the whole thereof on said grounds.

VI.

Answering paragraph XIII of said amended petition, respondent alleges that it has no information or belief sufficient to enable it to answer either or any of the allegations contained therein, and basing its denial on said grounds denies each and every allegation therein. [364]

VII.

Answering paragraph XIV of said amended petition, this respondent denies each and every allegation except so much thereof as alleges as follows:

“All eight of said respondents have construed and applied said July 28, 1946, contract as a ‘closed shop’ agreement, effective at once against all bottlers and brewers in the Company’s employ, who might not be members of said Teamsters Locals 896 or 893, including returned veterans of the armed forces during the reemployment year provided for in Section 8 of the Selective Training and Service Act of 1940.”

Respondent Los Angeles Brewing Company alleges that said respondent, together with all other employers engaged in the brewing industry in the State of California, signatories to Exhibits “A” and “B,” so construed said contracts. Further answering said paragraph this respondent admits the allegation of said paragraph which reads as follows, to wit:

“... the National Labor Relations Board had not certified the Teamsters Council as the

collective bargaining agent for any portion of the Company's employees; and that said Board had not, and did not, prior to December, 1946, determine what unit of the Company's employees might be a proper unit for collective bargaining with the Company, through such Teamsters Council; and that said Board has not yet certified said Teamsters Council as the collective bargaining agent for the Company's employees . . ."

and alleges in response to aid allegation last above set forth that under and pursuant to the provisions of the National Labor Relations Act, 49 U.S. Stats. 452, 29 U.S.C.A. 151, et seq., a certification by the National Labor Relations Board is not a requirement [365] to impose upon this respondent the duty and obligation to bargain with the representatives duly selected by a majority of its employees, and in connection therewith does alleges that in the National Labor Relations Board cases numbered 21-R-3564 to and including 21-R-3570 and 21-R-3697, said cases being generally entitled and identified as "Acme Brewing Company, et al., vs. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, CIO," the said National Labor Relations Board did find the unit covered by the contracts, Exhibits "A" and "B" attached hereto, to be an appropriate unit for collective bargaining. Respondent is informed and believes and upon such information and belief alleges that at all times from on or about July 26,

1946, to wit: Prior to the execution by this respondent and all other brewery operators in California of said contracts, Exhibits "A" and "B," and at all times thereafter and subsequent thereto, to and including date hereof, the Joint Local Executive Board of California and Locals 893 and 896, have represented a majority of this respondent's employees in its brewery and bottling departments, and that at all of said times last mentioned a majority of its employees in said departments, as well as in similar departments in the breweries in all employer signatories to said contract referred to in this answer, have been and are now bona fide members in good standing of the said Joint Local Executive Board of California and of Locals 893 and 896 respectively.

VIII.

Answering paragraph XV of said amended petition respondent denies generally and specifically each and every allegation in said paragraph contained save and except respondent admits that petitioner Fred Elia Iob was reemployed by this respondent as a brewer on or about September 9, 1946, and that he was then discharged by respondent company on September 15, 1946, pursuant to written demand of one Elmer Schaffer then Secretary of said Local 893, on the grounds that the said petitioner Iob was not then a member of said Local 893, and does further admit that the said petitioner Iob was reemployed by respondent as a brewer on November 6, 1946, with the consent and approval

of the said Elmer Schaffer. This respondent does further admit that the said petitioner was thereafter discharged by respondent on or about November 25, 1946, on demand of the said Elmer Schaffer, Secretary of the said Local 893, on the ground that the said petitioner was not then a member of said Local 893. Further answering said paragraph, this respondent alleges that the said petitioner Iob was entitled by law to be reemployed and retained in said position as a brewer by the respondent company for one year, so long as he complied with the terms and conditions of the collective bargaining agreement in effect at the time of his reemployment, and as such collective bargaining agreement might be from time to time during the period of his reemployment, and subject further to a proper discharge of his said duties as a brewer, and does further allege that if a condition of said collective bargaining agreement, or agreements, was membership in a certain union, then the said petitioner Fred Elia Iob was subject to the terms and provisions of said collective bargaining agreement as entered into by this respondent and the representatives of a majority of its employees in the said brewing department. Respondent does deny that it has discriminated against the petitioner Fred Elia Iob in any way, manner, or by any means whatsoever.

IX.

Answering paragraph XVI of petitioners' amended petition, this respondent denies that petitioners Dobbs and Ullrich were prevented from

working between September 21, 1946, and October 5, 1946, by the fact that on September 21, 1946, a strike was called [367] against this respondent by the said International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO, its Locals 296 and 297, and its other CIO locals, although respondent admits that such a strike was called, that a picket line was placed about its plant and premises located at 1910 No. Main Street, Los Angeles, California, commencing on or about September 21, 1946, to and including on or about March 27, 1947, and that its products were declared "unfair," that boycotts and other economic reprisals were undertaken by the said International Union last mentioned and its said locals, thereby interfering with this respondent's business. Further answering said paragraph this respondent denies that said strike was in protest against the firing of bottlers and brewers, as in said paragraph XVI alleged, and alleges that the said strike was called as a part of and in connection with an attempt by the said International Union and Locals 296 and 297, to compel this respondent, as well as other breweries in Southern California, to recognize, negotiate with, and hire only members of said International and Local Unions, CIO, in its brewing and bottling departments. Further answering said paragraph this respondent denies that petitioners Samuel M. Dobbs and Waldemar F. Ullrich were prevented from working by the establishment and maintenance of said picket line at the entrance

to this respondent's brewery, and alleges that the said petitioners Dobbs and Ullrich voluntarily respected said picket line and voluntarily terminated their employment with respondent. Further answering said paragraph this respondent admits that in order to go to work said petitioners would have had to cross the said picket line maintained by their own International Brewery Workers local union in which they were there and then members. Further answering said paragraph this respondent is informed and believes, and upon such information and belief alleges that the said petitioners Iob, Dobbs, and Ullrich were offered membership rights in the Joint [368] Local Executive Board of California, Local 893 with respect to the said petitioner Iob, and Local 896 with respect to the other remaining petitioners, and that the said petitioners did refuse and do now refuse membership therein. Further answering said paragraph this respondent denies that on or about September 23, 1946, the company, through its superintendent in charge of employment, informed petitioner Ullrich and others who had not crossed said picket line, that their employment by the company had not been terminated, and that the company would not issue termination slips to such workmen, nor even to the strikers. This respondent does further deny that the company's superintendent at that time or at any other time, informed the petitioners herein that they were still considered employees of the company. Further answering said paragraph this respondent alleges

that on or about September 27, 1946, its said superintendent informed petitioners Ullrich and Dobbs, and one Busick Glenn that the company was in effect holding their employment status in status quo, and that their time cards had not been removed from the company's current payroll records as of that date.

X.

Answering paragraph XVII of petitioners' amended petition, this respondent denies that on or about September 27, 1946, petitioners Dobbs and Ullrich with certain other veterans of the Armed Forces also formerly employed as bottlers, informed any superintendent of respondent company that they were ready and willing to go back to work and would report therefor at the brewery the next morning if such superintendent would permit them to do so, but admits that the said petitioners Dobbs and Ullrich did so inform one of respondent's superintendents, to wit: The superintendent in charge of its bottling department, and does further admit that the said superintendent at said time informed the said petitioners Dobbs and Ullrich that they would have to clear with Anthony J. [369] Ziegler, Secretary and Business Agent of Teamsters Local 896, one of the respondents herein. Further answering said paragraph respondent admits that on or about October 5, 1946, and subsequent to a conference with the said Anthony J. Ziegler with respect to their reemployment by respondent brewery or any other brewery in Southern California, the

petitioners Dobbs and Ullrich again reported to the company's bottling superintendent and informed him that the said Anthony J. Ziegler had refused to clear them for work in the company's brewery, but that they were then ready to go to work in their former positions. Further answering said paragraph this respondent admits that the said superintendent above referred to, upon being informed that the said petitioners Dobbs and Ullrich were not members of said respondent Teamsters Local 896 and had therefore not been cleared for work by the Secretary of said local union, to wit: The said Anthony J. Ziegler, informed them that they could not therefore, and by reason thereof, be considered for reemployment, and words to like effect. Further answering said paragraph this respondent denies generally and specifically all other allegations in said paragraph contained save and except that petitioners Dobbs and Ullrich have not been employed by the respondent company since said October 5, 1946, and save and except this respondent has no information or belief sufficient to enable it to answer the allegations in said paragraph contained with respect to conversations alleged to have taken place between any of the petitioners and a respondent Ziegler, as set forth and contained in lines 22 to 29, of said paragraph XVII, and basing its answer on said grounds denies generally and specifically each and all of said allegations last referred to. Further answering said paragraph respondent denies that the petitioners Dobbs and Ull-

rich were discharged without cause from their restored positions as in said paragraph alleged, and does further deny that the said Dobbs and Ullrich were discharged at any time or times for any cause whatsoever, and does [379] allege that the said petitioners Dobbs and Ullrich voluntarily terminated their said restored positions with respondent company. Further answering said paragraph respondent alleges that on November 14, 1946, a notification of the termination of said strike and the request for reemployment of the strikers was made by the said International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO, under the name International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, copy of which is attached hereto, made a part hereof, and marked Exhibit "C."

XI.

Answering paragraph XVIII of petitioners' amended petition, this respondent denies generally and specifically each and every allegation of said paragraph contained.

XII.

By way of affirmative defense to petitioners' amended petition, this respondent does allege as follows, to wit:

First Affirmative Defense

The Court has no jurisdiction pursuant to 38 U.S. Stats. 738, 29 U.S.C.A. 52, 53; 47 U.S. Stats.

70, 29 U.S.C.A. 101 to and including 115 by reason of the existence of a labor dispute.

Second Affirmative Defense

The petitioners in the instant case are without clean hands in that they were parties to that certain action instituted by the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, CIO, Local 227 of said CIO, International and Local 7 of said CIO, International and other locals of said CIO, International on behalf of all of the members of said Local 227 and Local 7 including the petitioners herein, in the Superior [371] Court of the State of California in and for the County of Los Angeles entitled International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, an unincorporated association, et al, v. Acme Brewing Company, et al, numbered 517,511 therein, wherein and whereby said plaintiffs for and on behalf of said petitioners and others sought to obtain from the Superior Court of the State of California, a temporary and permanent injunction discharging all employees, veteran and non-veteran, in the breweries in Southern California, including the respondent's brewery, who were not members in good standing in said CIO International and locals, or who refused to be or become members of said CIO International and said CIO locals, and said petitioners are without equity.

Third Affirmative Defense

That said petitioners seek to enjoy the benefits of the collective bargaining contracts between the additional respondent, Joint Local Executive Board of California, and the brewery employers, including said respondent brewery company, including an \$8.00 per week increase in wages negotiated by said additional respondent Joint Local Executive Board of California, in December, 1946, and the other and additional benefits negotiated and obtained for the employees in said California breweries, including respondent brewery company, by the agreement, Exhibit "B" attached hereto and made a part hereof, effective April 1, 1947, at the same time refusing to accept its burdens, i.e., membership in said AFL unions, and said petitioners are therefore without equity.

Fourth Affirmative Defense

Said amended petition fails to state a claim against this respondent upon which relief can be granted. [372]

Fifth Affirmative Defense

The Court has no jurisdiction over the subject matter of the action.

Wherefore, said respondent Los Angeles Brewing Company prays that petitioners' petition be dismissed, and that said respondent go hence with its costs.

HANNA AND MORTON,

/s/ JAMES M. McROBERTS,

Attorneys for Respondent

Los Angeles Brewing Co.

State of California,
County of Los Angeles—ss.

Charles J. Lick, being first duly sworn deposes and says:

That he is Vice President of respondent Los Angeles Brewing Company in the above-entitled action; that he has read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ CHARLES J. LICK.

Subscribed and sworn to before me this 18th day of June, 1947.

[Seal] /s/ LAURA TEETER,

Notary Public in and for Said
County and State. [374]

EXHIBIT "B"

CONTRACT

Joint Local Executive Board of California, comprising Brewery Drivers & Helpers Local Union No. 203; Brewery Drivers & Helpers Local Union No. 683; Brewery Shipping, Receiving Clerks and Checkers Local Union No. 884; Brewery Drivers & Helpers Local Union 888; Brewers, Maltsters &

Yeast Workers Local Union No. 893; Bottlers Local Union No. 896, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Effective April 1st, 1947.

Agreement

Whereas, the Joint Local Executive Board of California, Locals Nos. 203, 683, 884, 888, 893, and 896 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, state and allege that as of the date hereof, said Joint Local Executive Board of California is the designated and selected representative of the employes in the brewing, bottling, delivery, shipping and receiving departments of all the breweries and distributing companies for the purpose of collective bargaining with respect to rates of pay, wages, hours, and other conditions of employment which said specific statement and allegation constitutes the material consideration to the employers.

Now, Therefore, after presentation of evidence of such representation and in consideration of the mutual promises herein contained, it is agreed:

Section 1. (a) Only members in good standing who are members of local union 893 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, be employed as brewers in the brewing departments, including all basements, platforms, and wash houses used in connection with the operation of the brewing department.

(b) Only members in good standing who are

members of Bottlers local union 896 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America shall be employed as bottlers in the bottling department at the brewery, including all basements, platforms, storage and yards used in connection with the operating of the bottling departments in positions where bottlers are now employed, or in those [399] branches where employer may require the employment of a steady crew to perform bottlers work.

(c) Only members in good standing who are members of local unions nos. 203, 683, and 888 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, shall be employed as shipping drivers and helpers, special delivery drivers and helpers, bottle route drivers and helpers, keg beer drivers and helpers, within jurisdiction of locals Nos. 203, 683, and 888.

(d) Only members in good standing who are members of Local union 884 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, shall be employed as checkers and shipping clerk in the shipping department and receiving departments conducted at Brewery premises, or in any warehouses adjacent thereto.

(e) Brewmasters and assistant brewmasters, and foremen who perform no manual labor, and employes in managerial capacity of any kind or nature shall not be covered by any term or provision of this contract and may be employed regardless of union membership.

(f) This contract shall cover only employes who perform their services principally within the State of California for the respective employers.

(g) Provided, however, in those cases in which the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, permits mixed branches, i.e. branches in which members who normally would belong to local unions 203, 683, 888, 884, 893, and 896 but are members of a mixed branch of any of said local unions, only members in good standing who are [400] members of such mixed branch of any said local unions shall be employed in the capacities hereinabove set out, and provided further that all unloading, and loading, of brewing materials, supplies, and beer containers in and from railroad cars within 2 blocks of the brewery premises shall be done by members of the aforesaid unions or branches thereof.

Section 2. All employes shall be obtained and hired through the respective local unions, and branches thereof to which the employes in said department are required to belong, provided, however, that should respective local unions be unable to provide the necessary satisfactory employes, then and in that event, said employes may be obtained from any source, provided, however, that said employes so obtained through other sources must be cleared through the union office within 24 hours (excluding Sundays and holidays) after commencing work, and said unions shall deliver a temporary clearance to such employe.

The Employer in those cases where he is required hereunder to employ only members of the respective unions hereinbefore mentioned except local 896, shall, in all cases involving regular employes as distinguished from employes required for temporary employment, have the right of selection from the list of unemployed union members or temporary men, which list shall be maintained by and furnished by the Secretary of such local union to the employer on request.

Section 3. No employe shall be discharged or discriminated against for upholding union principles, nor may any employe be discriminated against or discharged who engages in work for and under the instructions of said local unions Nos. 203, 683, 884, 888, 893 or 896, or any branches [401] of same, or either, or all of them, and said employes shall be permitted to take such time as may be necessary to discharge these duties or any of them, provided however, that said employe shall be paid no compensation whatsoever by employer for said time devoted to the performance of said duties, or any of them.

Section 4. (a) Sickness shall be no cause for discharge and any employe who shall cease work because of sickness, provided that such sickness does not last longer than 6 months and also provided, that said employe is capable of performing his usual duties. shall upon recovery, be entitled to and receive his former position.

(b) Injuries received through accident in performance of duties shall be no cause for discharge

and any employe injured through accident shall be entitled to receive his former position upon recovery from said accident, irrespective of the period of time which may elapse between his injury and recovery provided that said employe is capable of performing his usual duties.

(c) The employer shall have the right to call in temporary help to discharge the duties of an employe who is on the sick or injured list. Upon the return of such regular employe, employer shall be entitled to discharge such temporary employe as may have been fulfilling the duties of said sick or injured employe regardless of the duration of such sickness or injury.

(d) Any employe, other than a temporary employe, leaving his position as an inductee of the Armed Land and Naval Forces of the United States under the provisions of the "Selective Training Service Act of 1940," shall, upon completion of their period of training under Section 3 (b) of that Act or that period of enlistment, be restored to [402] their former positions, according to seniority held at the time of induction, provided that they are capable of performing the duties of such position and have reported for work within 90 days following their discharge from such service. Upon the reinstatement of any such person to his position, employer shall be permitted to discharge such employe as such returned serviceman shall displace.

Section 5. (a) The employer shall install in the respective department all legally required safety appliances and first aid materials to insure em-

ployes against danger to health, life and limb, and shall furnish a sanitary washroom, and dressing room with lockers, or the equivalent thereof.

(b) The employes shall be furnished, free of charge, the use of a a rubber suit, rubber gloves and rubber boots for the purpose of cleaning the shops, or equipment, and in all cases involving the use of caustics.

Section 6. Good employers beer, for consumption on the premises, shall be furinshed to the employes free of charge, once during the morning shift, at noon, in the middle of the afternoon shift, and at quitting time.

Section 7. All things being equal, union made materials and machinery shall be given preference.

Section 8. Union labels of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, shall be supplied to all breweries that comply with this contract.

Section 9. Only one controlling owner, controlling shareholder, or bona fide partner shall perform any of the work in any of the departments covered by this contract. Foremen or assistant [403] foremen shall do no work in shops unless they are members of the union. Nothing, however, in this agreement shall be construed as to interfere with the right of the foremen to look after the machinery or assist at short intervals whenever a man is lacking, provided in such case application is made to the union for a man.to fill the vacancy.

Section 10. No employe shall have his wages reduced or his hours of labor increased by reason of this contract. Any commission paid is not to be considered wages.

Section 11. (a) All work done in addition to the regular 8 (eight) hours daily work shall be considered and paid for as overtime. Overtime must be paid for and shall not be taken out nor balanced by lay-off.

(b) All overtime and Saturday work shall be paid for at the rate of time and one-half, it being understood that a work day or shift starting on a straight pay basis shall be completed as such.

(c) All work performed on Sundays and holidays shall be paid for at the rate of double time provided that no employe covered hereby may be employed for less than four hours on such days.

(d) The minimum weekly wages specified hereinafter are for a full week's work as herein provided and it is definitely understood that on days on which no work is performed for any reason, otherwise than on holidays or election days hereinafter specified, any employe shall receive no compensation.

Section 12. The following shall be considered legal holidays: New Years Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day. One additional day shall be granted as a holiday and shall be either Admission Day or Armistice Day, [404] and the day shall be determined in Northern and Southern California by agreement between the Joint

Local Executive Board and a majority of Breweries in each said respective territory.

(a) There shall be no deduction of pay as a result of not working on these holidays and if any employe is required to work on the above holidays he shall be compensated at the rate of double time.

(b) When the above-mentioned holidays fall on Sunday, the following Monday shall be considered a holiday.

(c) Any employe of local unions No. 203, 683, 884, 888, 893, and 896 who is laid off on election days: City, County, State or Federal, shall be granted a straight day's pay for same.

(d) To qualify for holiday pay the employe must work his work day before and after the holiday unless the employe is excused by the employer for bona fide reasons.

Section 13. All employes, upon completion of 45 weeks of continuous employment for the same employer within a 12 (twelve) months consecutive period shall be entitled to one week's vacation with full pay. Any employe who has not qualified for a vacation within a period of twelve (12) consecutive months may qualify within a period of twenty-four (24) consecutive months. Employes shall be allowed not in excess of 60 (sixty) calendar days on account of illness or accident during said twelve months period, and the same shall not constitute a violation of the provisions of this paragraph. It is the intention of the employer that vacations be taken from May to September if possible. Seni-

ority shall prevail relative to choice of vacation time.

(a) Each such employe after 2 (two) consecutive [405] years of continuous employment with the same employer shall during continuous service thereafter with such employer be entitled to two weeks' vacation with pay at the end of any 45 (forty-five) weeks worked within any consecutive 24 (twenty-four) months. An employe shall become entitled to his vacation in no period short of 52 (fifty-two) weeks and no time of employment worked in excess of 45 (forty-five) weeks in any consecutive 52 (fifty-two) weeks of employment can be carried over as a credit to the next vacation.

(b) Compensation for said vacation to be paid at the rate provided for on shift on which employe worked.

(c) Disputes arising through claims for vacations, not otherwise specified herein, shall be adjusted by mutual agreement between the employer and the union.

Section 14. The employer firms shall at all times have the entire right of selection and placing of men or the rearrangement of employes, regardless of seniority.

Section 15. The loading and unloading of trucks driven by an employe of a brewery from a platform or space mutually agreed upon shall be considered driver's work.

Section 16. Any literature distributed by any employe without the consent of the employer will

give the employer the right to discharge immediately any such employe, providing that such literature is distributed during working hours.

Section 17. There shall be no apprentices or learners in any department except the brewing, malting and syrup departments.

Section 18. Employes discharged for embezzling employer's money or property shall be [406] dropped from the membership roll of the union to which they belong, after having had a fair trial by said union and having been found guilty. Pilfering of cases or inducing bottlers or loaders to give drivers extra bottles shall be regarded as embezzlement and dealt with as above set forth. The furnishing of surety bonds against embezzlement shall be left to employer's discretion, provided, however, that said employer shall be required to pay the premium on said bond, and provide dfurther that asid bond shall in no way be construed as affecting said employe's obligation to said employe's union.

Section 19. In the event that any employe from whom a surety bond shall be required by the employer cannot provide \$500 (Five Hundred) Dollars cash, or cannot obtain from or qualify with a representative and regularly established surety company doing business in California the requisite surety bond, the employer may at his option refuse to accept such person as an employe.

Section 20. Differences that may arise as to the

interpretation of this contract shall be referred to a Board of Arbitration consisting of two members of the union and two representatives of the employer firm; said Board shall meet within two weeks from the time that a demand for arbitration has been made. Should these four fail to agree, they shall together elect a fifth disinterested party, and the decision of the majority of the whole shall be final and binding upon both parties.

Section 21. Should any of the plants become inoperative because of fire, earthquake, or other Act of God, all provisions contained herein shall apply only to persons employed in actual capacities governed by this contract.

Section 22. It is further agreed that this contract may be altered, changed, or deviated from by the written agreement of the Joint Local Executive Board of California and the employers and the Joint Local Executive Board of California alone, for the unions and employes, may enforce this agreement.

Section 23. This contract shall be in full force and effect from the date hereof to March 31, 1948, inclusive, and shall continue thereafter from year to year unless a written notice of intent to change or terminate the same shall have been given for at least 30 (thirty) days prior to any March 31st anniversary date of this contract. Such notice shall be given in the case of employes by the Joint Local Executive Board of California to any employer herein and the California State Brewers In-

stitute or in the case of employers by any employer herein or the California State Brewers Institute to the Joint Local Executive Board of California.

Brewers

Section 24. Eight (8) consecutive hours, exclusive of an interval of one hour for meals, shall constitute a day's work and five consecutive days (respectively 40 hours) shall constitute a week's work, except Saturday when 5 (five) hours and 20 (twenty) minutes shall constitute a day's work. The regular working day shall commence on Monday. The regular working day shall not commence before 7:00 a.m. and shall not continue after 6:00 p.m. All work done before 7:00 a.m. and after 6:00 p.m. shall be considered overtime; provided, however, that the night man or men employed in the brew-house shall work eight (8) consecutive hours, twenty minutes to be allowed for lunch, but the time at which this work shall commence shall be left to a mutual understanding between the employer and employes concerned. First men and coopers are governed by the contract [408] relating to working time and pay.

Section 25. One apprentice shall be permitted in each brewery employing not less than 5 (five) members of local union No. 893. In case that the number of men employed shall equal thirty (30) members, then a second apprentice may be employed, and with 40 (forty) members, a third one, and one to every additional thirty. Apprentices shall be governed by the rule of the union and shall be

instructed in all branches of the trade for a term of not less than two years. Apprentices may work overtime, provided the shift on which they are employed is working overtime. They shall not be less than 18 years of age nor more than 25 years at the beginning of their terms of apprenticeship. Apprentices must be accepted by the union as members before starting their apprenticeship.

Section 26. It is agreed that no new or additional apprentices may be employed in brewing, malthouse and syrup departments, as long as the employes in said departments are being laid off in rotation, and as long as 5 (five) per cent of the membership of local union 893, permitted to work in said departments are on the out of work list.

Section 27. Provided, further, however, that sons of the brewery and malt house proprietors may be employed as apprentices at any time in breweries controlled by their parents as long as they do not replace a member of local union 893.

Section 28. The wage paid in all breweries shall not be less than \$67.00 (sixty-seven dollars) per week for the first shift, \$69.00 (sixty-nine dollars) for the second shift and \$71.00 (seventy-one dollars) for the third shift. The wages paid to apprentices shall be not less than \$52.00 (fifty-two dollars) per week for the first shift for the first year, \$54.00 (fifty-four dollars) for the second shift [409] and \$56.00 (fifty-six dollars) for the third shift. \$54.00 the second year, \$56.00 (fifty-six dollars) for the (fifty-four dollars) per week for the first shift for

the second year, \$56.00 (fifty-six dollars) for the second shift and \$58.00 (fifty-eight dollars) for the third shift. The wages shall be paid in full weekly, in lawful money of the United States.

Section 29. Should it become necessary during the dull season to lessen the working force, the men may be laid off in rotation in an impartial manner for not longer than one week at a time and it is expressly understood that there should be no laying off for any fractional part of a day or week. First men or apprentices are included in this lay off system. In case brewers are laid off, coopers shall not be permitted to do brewers' work. Temporary men must be laid off before rotation lay-offs begin.

Section 30. In breweries situated in Northern California, the average number of brewers employed in a brewery during April and May of each year shall be considered the minimum number of brewers to be employed for the succeeding year, subject to the usual layoff system; that is to say, the employer has the right to dispense with men during April of each year, and the number of brewers to be employed for the succeeding year must not be less than the average number of brewers employed during April and May. Should such a reduction be contemplated, strict seniority rights shall prevail and the apprentices' seniority shall start from the time of their acceptance as journeymen. The employer also has the right to employ extra union men during the months of July, August and September.

(b) In breweries situated in Southern California, should it become necessary during the dull season to lessen the working force, the men may be laid [410] off in rotation in an impartial manner, for not longer than one week at a time, and it is expressly understood that there should be no laying off for any fractional part of a day or week. The first men and working foremen and apprentices are included in this layoff system, arranged by employer and shop steward, and the local union. The employer also has the right to employ extra workmen during the months from April 1st to October 30th. Any man working after October 30th shall be considered a steady employe.

Section 31 (a). When men are varnishing tanks or engaged in work with explosives or inflammable materials within closed tanks, the men doing this work must have a watchman on the outside of the tank at all times and safety apparatus shall be inspected and placed in perfect condition before the men go into the tank to perform the above work.

Section 32. Preparing for coating and coating of vats is to be considered brewers' work when done by breweries. If work is contracted out, such contracts must take into consideration this fact and provide such work must be done by brewers.

Section 33. No man shall be forced to pile full half barrels two high unassisted.

Bottlers

Section 34. Eight consecutive hours exclusive of an interval of one hour for meals shall constitute a day's work and forty hours shall constitute a week's work. The regular working day for the day crew shall not commence before 7:00 a.m. and shall not continue after 6:00 p.m. If two crews are employed on the one unit of machinery the regular working day of the night crew shall be 8 (eight) hours and shall commence at the conclusion of the working day of the day crew, providing [411] that no overtime is worked. It shall be optional, however, to arrange the hours of the night crew to the mutual satisfaction of the employer and employee. The regular work week shall commence on Monday and shall end on Friday at the conclusion of the regular day's work. All plants shall be permitted to work overtime whether operating steadily or not. On Saturday bottlers, if worked, shall be worked a minimum of 5 (five) hours and 20 (twenty) minutes payable at the rate of time and one half. Proprietors or foremen shall have the right of determining the number of men required to work such overtime and all overtime shall be equally divided among members of the shop.

(b) It shall be permissible to have men report for work before 7:00 a.m. to load out drivers on special trips or long hauls.

Section 35. The firms will operate all available lines of bottling machinery during the day shift before the establishment of night shifts, providing

that where certain lines are incapable of filling particular types of bottles or containers or where because of superannuated equipment a material divergency of production would result, this provision shall not apply.

Section 36. The minimum weekly wage shall not be less than \$62.50 weekly (sixty-two dollars and fifty cents) for the first shift, \$64.50 (sixty-four dollars and fifty cents) for the second shift and \$66.50 (sixty-six dollars and fifty cents) for the third shift. Wages to be paid in full, weekly, in lawful money of the United States of America.

Section 37. Should dullness of trade necessitate a layoff, the employes shall be laid off according to seniority not less than one day at a time nor more than one day per week, except in case of breakdown. If a breakdown occurs in the forenoon, [412] the men shall work the morning out; if a breakdown occurs in the afternoon the men shall work the day out. Should a reduction of the working force become necessary to comply with the provisions of this section as to the minimum crew and time worked, the first man hired shall be the last man laid off; further if help is again called, the last man or men in point of service, who were laid off, shall be the first to be re-hired. The employer has the right to increase or reduce the force should business necessitate. All employes shall receive equal chances at any spare work performed on days that shop is not bottling. However, it is permissible to rotate

the men irregularly in cases where special work is done for which certain men are more adaptable.

(b) It is agreed that where extra crews are required for temporary work, the employer may work such crews 4 (four) consecutive days, excepting Saturday or Sunday, within 2 (two) weeks' period, provided that existing crews are working five days per week.

Section 38. The loading and unloading of cars of beer and bottle house supplies, on and adjacent to premises, and all work performed on same shall be considered bottler's work. Loose bottles in car-load lots shall be crated and handled by union bottlers, provided that such car is spotted within two blocks of the bottle house.

Section 39. No employe shall be required to change shifts during the calendar work week, unless such employe shall have had a period of at least 12 hours between the conclusion of the last shift worked and the commencing of a new or different shift to which he may be assigned. Provided, that for overtime work, any man available who has not worked the preceding 12 (twelve) hours may be used. It shall be permissible in any [413] event to change the employe or employes shift at the end of each work week.

Drivers

Section 40. Eight consecutive hours, exclusive of an interval of one hour for meals, unless a shorter meal time is agreed to, shall constitute a day's work

and 5 days (respectively 40 hours) shall constitute a week's work. The regular work week shall commence on Monday and shall end on Friday inclusive.

Drivers and helpers may begin work between 7:00 a.m. and 8:00 a.m. and one special driver and helper if needed to begin at 9:00 a.m. No driver or helper shall start before 7:00 a.m. unless in case of emergency, and time before 7:00 a.m. shall be paid as overtime. All work performed after 8 hours worked after 7:00 a.m. shall be paid for at the time and one-half rate, and not to be balanced by lay-off.

Shipping Drivers and Helpers may work on Saturday provided that the hauling is to wharves, freight sheds, or loading cars for shipping and highway hauling, and such Saturday work is to be paid for at the rate of time and one-half. The work week for shipping drivers and helpers may begin on Monday or Tuesday and Saturday work shall constitute a minimum of five hours and 20 minutes.

Keg route drivers and helpers and bottle route drivers and helpers shall not be required to do any shipping after servicing their routes, but may do so by mutual agreement.

Not more than two special delivery trucks may work on holidays for not less than four hours.

Keg and bottle beer may be hauled in the same truck.

Section 41. The minimum scale of wages shall not be less than \$66.00 (sixty-six dollars) per week

for keg beer drivers, bottle route drivers, shipping and special drivers, and \$63.00 (sixty-three dollars) per week for helpers on keg beer trucks, bottle beer trucks and shipping trucks. Night loaders shall be paid \$68.00 (sixty-eight dollars) for second shift. Wages to be paid in full, weekly, in lawful money of the United States of America.

Section 42. All trucks directly operated by the employers for transportation of malt beverages or containers shall be operated by local unions Nos. 203, 683, and 888.

If transportation truck or trucks are forced to stay over night in any town, the employer shall pay for the driver's room and board for the night of the layover.

Section 43. The washing of trucks operated by the employer if done on the premises shall be done by employes hired to perform such work, and who must be members of local unions Nos. 203, 683, or 888. The minimum wage shall be \$63.00 (sixty-three dollars) per week for the first shift, \$65.00 (sixty-five dollars) for the second shift, and forty hours shall constitute a week's work. Employes may start this work week on Monday or Tuesday and if employe works on Saturday, five hours and twenty minutes shall constitute a day's work.

Section 44. Drivers, upon authorization of credit department of employer, having left beer on credit, shall receive receipt for same and he shall not be held responsible for payment thereafter.

Section 45. The loading and unloading of trucks driven by an employe of a brewery from platform or space mutually agreed upon shall be considered driver's and helper's work.

Section 46. Beer drivers and helpers may be laid off not less than one week nor more than one week at a time impartially and in rotation. In winter months where it becomes necessary for keg routes and bottle routes, for some of the firms, to work four days per week, such schedule shall begin on November first and end March first.

Section 47. Extra shipping drivers and helpers shall be furnished by the union for the purpose of getting out rush orders. Such extra help can be dispensed with when the work for which they have been engaged is finished. Extra drivers or regular drivers and helpers who have been temporarily laid off shall not be called into service for a fractional part of a day unless they be given a full day's pay for same. If a rush order or an unavoidable accumulation of empties require more shipping facilities than employer has vehicles to handle, then in that case draying firms may be employed to complete such work.

Section 48. Employers requiring their drivers or helpers to wear uniforms, caps or hats advertising their products or firm's name shall furnish such uniforms, caps or hats with union labels, together with regular laundry of same, free of charge to their employes.

Men shall report for work clean and presentably dressed to meet the public or pass public inspection.

Shipping Clerks

Section 49. Eight consecutive hours, exclusive of an interval of one hour for meals, unless a shorter meal time is agreed to, shall constitute a regular day's work, and five consecutive days of such eight consecutive hours shall constitute a week's work. The regular day shall not commence before 7:00 a.m. and shall not continue after 6:00 p.m. The starting time of the first shift may not be later than 9:00 a.m. in case of an employe working [416] with an hour lunch period and 9:30 a.m. when employe works under a half hour lunch period, except where arranged to the mutual satisfaction of employer and employe. A second shift may be started at any time after three p.m. and work performed during such shift shall be compensated at the second shift rate. The employer shall have the right to determine the number of men to work overtime, and overtime shall be divided among the men as equally as possible. However, it is permissible to rotate the men irregularly in cases where special work is to be done for which certain men are more adaptable. The regular work week shall commence on Monday and shall end on Friday, at the conclusion of the regular day's work. Any member working Saturday shall be hired for not less than five hours and twenty minutes which shall be paid for at time and one-half.

Section 50. The wages shall be paid weekly, in lawful money of the United States of America as follows:

For receiving and shipping clerks and checkers, a minimum weekly wage of not less than \$62.50 (sixty-two dollars and fifty cents) for the first shift and \$64.50 (sixty-four dollars and fifty cents) for the second shift and \$66.50 (sixty-six dollars and fifty cents) for the third shift.

Section 51. Should a dullness of trade necessitate a lay-off, the employes shall be laid off in an impartial way in rotation, according to seniority, but no one shall be laid off longer or less than one (1) week at a time. Should permanent reduction in the working force become necessary, the employes shall be laid off impartially according to seniority.

Section 52. If during the busy season, it is necessary to employ extra help, such help shall be employed through local 884. [417]

In Witness Whereof, the parties have hereunto set their hands and seals by their respective representatives, this first day of April, 1947.

For the Employers:

California State Brewers Institute.

Signed: James G. Hamilton, Secretary, comprising

Acme Brewing Co., S. F. & L. A.

Bohemian Distributing Co., L. A. & San Diego.

General Brewing Co., S. F.

Rainier Brewing Co., S. F. & L. A.

San Francisco Brewing Corp., S. F.

Regal Amber Brewing Co., S. F.

Maier Brewing Co., L. A.

Stewart McKee Brewing Co., L. A.

Aztec Brewing Co., San Diego.

Pacific Brewing & Malting Co., San Jose.

Grace Bros. Brewing Co., Santa Rosa.

Los Angeles Brewing Co.

Signed: Charles J. Lick, Vice-President &
General Manager.

Grace Bros. Brewing Co., L. A.

Signed: H. S. Johnson.

Fresno Brewing Co., Fresno.

Signed: H. S. Johnson.

Buffalo Brewing Co., Sacramento.

Signed: H. S. Johnson

Golden West Brewing Co., Oakland.

Signed: Thos. G. Walker, Gen. Manager.

El Dorado Brewing Co., Stockton.

Signed: A. J. Rothenbush, Pres.

Anheuser-Busch Co., S. F. & L. A.

Pabst Sales Co., S. F. & L. A., Long Beach
& San Diego.

For the Employers:

Southern California Beer Distributors Asso-
ciation. [418]

Signed: B. C. Fields.

comprising

A. B. C. Dist. Co., Santa Monica, Calif.

Acme Dist. Co., Pasadena.

Antelope Valley Dist. Co., Lancaster.

Associated Brewers Dist. Co., L. A.
Bohemian Dist. Co., Santa Monica.
Catalina Beverage Co., Avalon.
Associated Brewers Dist. Co. Inc., Long Beach.
General Dist. Co., L. A.
Globe Bottling Co., L. A.
Golden Glow Beverage Co., Long Beach.
Gray & Gray, Venice.
Home Ice & Cold Storage Co., Los Angeles,
Long Beach & Santa Ana.
Kelly Beverage Distributors, Santa Monica.
Park Beverage Co., Glendale.
Progressive Wholesale Liquor Corp., Los
Angeles.
Southern Calif. Brewers Dist. Co., Pasadena.
R. E. Spriggs, L. A.
Sunset Beverage Co., Culver City.
Valley Beverage Co., Pacoima.
Mr. L. M. Brodie, Lancaster.
Mr. Bryan Cone, San Fernando.
Harry B. Cooper, Los Angeles.
Mr. Jack Mason, Lancaster.
American Wholesale Dist. Co., L. A.
Beverley Beverage Co., L. A.
Candiotto Dist. Co., L. A.
James Ingram, L. A.
Merchants Wholesale, L. A.
Saul Rogers Dist. Co., L. A.
Sanitary Beverage Co., L. A.
Joseph Stool Dist. Co., L. A.
Wallack Dist. Co., Santa Monica.

West Coast Beverage Co., Venice.
Whittier Dist. Co., L. A. [419]
Crescent Commercial Co., L. A.
Red Top Dist. Co., L. A.
Peerless Dist. Co., L. A.
Bard Dist. Co., L. A.
Brewery Products, North Vernon.
General Liquor, W. Santa Barbara.

For the Employers:

Sacramento Valley Associated Industries.
Signed: John T. French, Manager.
comprising
Acme Beverage
Sterling Brands
Cal-Hi
Valley Dist. Co.
Al. Saccani Dist. Co.
John J. Bottano Dist. Co., Sacramento
Delta Dist. Co., Stockton, Calif.
Signed: Frank Nolder
Valley Beverage

For the Distributors:

Oakland & Vicinity
Kramm Dist. Co., Oakland
A. R. Markstein Co., Oakland
Richmond Beverage, Richmond
Better Brands, Oakland
Golden Brand Products, Oakland
C. Vitakes
Stow Beverage, Walnut Creek

Garms Dist. Co.

Diamont Bros., Hayward

For the Distributors:

San Francisco & Vicinity

Rossi Dist. Co., S. F.

Golden Brands, S. F. & San Mateo

Walker Beverage, Redwood City

Premium Products, S. F. [420]

General Enterprise, S. F.

Consumers Dist. Co., S. F.

Cervelli Dist. Co., S. F.

Monterey Dist. Co., S. F.

Marino Dist. Co., S. F.

Haas Bros., S. F.

Denver Bottling Co., S. F.

For the Employees:

Joint Local Executive Board of California

Signed: Martin Christen, Secretary

Brewery Drivers & Helpers Local Union No.

203, L. A.

Signed: George Leonard

Brewery Drivers & Helpers Local Union No.

683, San Diego

Signed: Larry M. Smith [421]

Brewery Shipping, Receiving Clerks &

Checkers Local Union No. 884.

Signed: Clay Bissant, Secretary, S. F.

Wm. Payne, Secretary Branch 1, L. A.

Brewery Drivers & Helpers Local Union No.

888

Signed: Martin Christen, Sec., S. F.

Chas. Wood, Sec., Branch 3, Oakland

Richard Lamb, Sec., Branch 4, Sacramento

A. E. Biewend, Sec., Branch 5, Stockton

Brewers, Maltsters & Yeast Workers Local

Union No. 893

Signed: Henry Jenichen, Sec., S. F.

Signed: Anton Schirle, Sec., Br. 2, San Jose.

Signed: Fred Parker, Sec., Br. 3, San Diego

Signed: Elmer Schaeffer, Sec., Br. 4, Los

Angeles

Signed: Wm. Vercoe, Sec., Br. 5, Fresno

Signed: Alois Bernauer, Sec. Br. 8, Santa Rosa

Bottlers Local Union No. 896

Signed: Wm. H. Ahern, Sec., S. F.

Signed: A. Clifford, Sec., Br. 2, Sacramento

Signed: Anton Zeigler, Sec., Br. 3, L. A.

Signed: August Wallner, Sec., Br. 6, Oakland

EXHIBIT "C"

November 14, 1946

Los Angeles Brewing Co.

1910 North Main Street

Los Angeles, California

Gentlemen:

On behalf of the following named employees and as their representative for collective bargaining, the undersigned applies for their immediate reinstatement to their former or substantially equivalent positions, respectively. Each of the said em-

ployees is now ready, able and willing to resume his job for you in the same or substantially equivalent capacity as that at which he formerly worked.

Howard Vause	Easton C. Anderson
Richard Jacobson	O. Parker
Jim Clements	Selden Johnston
Bernard J. Vieda	Samuel Dobbs
Lyman Garrell	Youl Holman
Parker	Fritz Heissler
Leonard Loomis	Harry Fisher
John Bernardie	Glenn Busick
Ernest Merz	Waldemore Ullrich
B. Reichelb	George Jones
Elmer A. Clausius	Mike Putz
Fred E. Iob	

The undersigned Union will be glad to meet with your representatives at a time and place mutually convenient for purposes of arranging the details of restoring them to their jobs.

Very truly yours,

INTERNATIONAL UNION OF UNITED
BREWERY, FLOUR, CEREAL AND SOFT
DRINK WORKERS OF AMERICA

By EUGENE J. McCANN,
Int'l Rep.

EJMC:EG [423]

[Endorsed]: Filed June 18, 1947. [424]

At a stated term, to wit: The February Term. A.D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 3rd day of September in the year of our Lord one thousand nine hundred and forty-seven.

Present:

The Honorable: Paul J. McCormick, District Judge.

No. 6322-M Civil

FRED ELIA IOB, et al.,

vs.

L. A. BREWING CO., et al.

For setting; James C. R. McCall, Jr., Ass't U.S. Att'y, for plaintiff; James M. McRoberts, Esq., for defendants;

Court and counsel make statements. It is ordered that the injunction heretofore requested is denied and that upon the deposit by the L. A. Brewing Co., a respondent in the case, of an amount sufficient to liquidate and discharge any unpaid wage claim that may be hereafter determined, that further proceedings in this case will be suspended until Nov. 4, 1947.

Counsel are to stipulate as to the amount aforesaid and upon the filing of such stipulation, the

amount is to be deposited in the Registry of the Court.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the petitioners herein and respondent Los Angeles Brewing Company, a corporation, acting by and through their and its respective counsel, as follows, to wit:

(1) That the respondent Los Angeles Brewing Company has deposited in the registry of this Court, good and sufficient surety bond in the sum of Fifteen Thousand, Five Hundred Dollars (\$15,500), and that the said principal amount of said bond is sufficient to liquidate and discharge any unpaid wage claim that may hereafter be determined in this proceeding, if any such determination be made against the respondent.

(2) That the deposit of said surety bond is not a recognition or admission by the respondent of any obligation to [425] the petitioners or any of them.

(3) That the deposit of said surety bond has been made in compliance with minute order entered in this proceeding on September 3, 1947, to which reference is hereby made.

Dated: September 15, 1947.

HANNA AND MORTON,

By /s/ JAMES M. McROBERTS,
Attorneys for Respondent
Los Angeles Brewing Co.

JAMES M. CARTER,
United States Attorney,

RONALD WALKER,
Assistant U. S. Attorney,
Chief of Civil Division,

By /s/ JAMES C. R. McCALL, JR.,
Assistant U. S. Attorney,
Attorneys for Petitioners.

It is so ordered.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed Sept. 15, 1947. [426]

[Title of District Court and Cause.]

PETITIONERS' REQUESTS FOR ADMIS-
SIONS UNDER F. R. C. P. RULE 36

Come the Petitioners pursuant to F.R.C.P., Rule 36(a), and request each of the respondents to admit the truth of the following facts, to wit:

1. That Schedules 1, 2, 3, and 4, photocopies of

which are attached hereto, and, delivered and exhibited herewith, were prepared by the Los Angeles Brewing Company in response to interrogatories propounded by petitioners to said company on May 29, 1947, and filed herein on that date.

2. That Schedule 1 is a true and correct statement and summary of the average number of hours of work performed by bottlers in the employ of the Los Angeles Brewing Company each week between October 6, 1946, and May 24, 1947.

3. That Schedule 2 is a true and correct statement of the individual average total wages paid each week by Los Angeles Brewing Company to bottlers for work performed by them in its employ between October 6, 1946, and May 24, 1947; and contains a correct statement of the wages which would have been paid by said company to Petitioner Dobbs and Ullrich, respectively, each week during said period if they had been then employed by the company as bottlers and had worked the average number of hours worked by all other bottlers employed by the company between said dates.

4. That Schedule 3 is a true and correct statement and summary of the average number of hours of work performed each week by brewers in the employ of Los Angeles Brewing Company between September 7, 1946, and November 6, 1946, and between November 25, 1946, and May 24, 1947.

5. That Schedule 4 is a true and correct statement of the individual average total wages paid

each week by Los Angeles Brewing Company to brewers for work performed by them in its employ between September 7, 1946, and November 6, 1946, and between November 25, 1946, and May 24, 1947; and contains a correct statement of the wages which would have been paid by said company to Petitioner Iob each week during said two periods, if he had been then employed by it as a brewer and had worked the average number of hours worked by all other brewers employed by the company during said periods.

6. That during the years 1946 and 1947, the respondent Los Angeles Brewing Company was a member of the California State Brewers Institute; and that said Institute acted as a collective bargaining representative for its members, including Los Angeles Brewing Company, in negotiating with the respondent Joint Local Executive Board of California and effecting with it certain working agreements dated July 28, 1946, and April 1, 1947, which agreements purported to regulate wages, hours and working conditions of persons employed in California breweries.

7. That under date of July 28, 1946, the respondent Joint Local Executive Board of California and the California State Brewers Institute, entered into two such collective bargaining agreements, one applicable to breweries located in Northern California, and the other applicable to breweries located in Southern California, and each purporting to

establish wages, hours and working conditions covering the employment of bottlers and brewers in such breweries; and that the second of these agreements, to wit, that applicable to breweries in Southern California, was signed by the respondent Los Angeles Brewing Company.

8. That later under date of April 1, 1947, the respondent [429] Joint Local Executive Board of California and the California State Brewers Institute, entered into another collective bargaining agreement, also signed by the Los Angeles Brewing Company, which purported to establish wages, hours and working conditions covering the employment of bottlers and brewers employed in breweries in Northern and Southern California, alike; and that this April 1, 1947, agreement supplanted and took the place of the two agreements dated July 28, 1946.

9. That said three agreements have been printed, and true printed copies thereof have been filed and exhibited in this case as follows:

(a) A true copy of the agreement dated July 28, 1946, applicable to Southern California breweries, is filed herein as Exhibit A to the Answer of respondent Los Angeles Brewing Company (June 18, 1947, and as Exhibit A to the Answer of respondent Joint Local Executive Board of California, et als (June 10, 1947), said two Answers being to the Petitioners' Amended Petition.

(b) A true copy of the agreement dated July 28, 1946, applicable to Northern California brew-

eries, is filed herein as Exhibit C-2 to the Affidavit of Wm. H. Ahern (verified June 9, 1947), filed by respondents other than Los Angeles Brewing Co., in opposition to the order to show cause.

(c) A true copy of the agreement dated April 1, 1946, applicable to both Northern and Southern California breweries, is on file herein as Exhibit B to the Answer of respondent Joint Local Executive Board of California et als and Exhibit B to the Answer of respondent Los Angeles Brewing Company, each being an Answer to Petitioners' Amended Petition; and also as Exhibit B to said affidavit of Wm. H. Ahern aforesaid.

10. That the reemployment of veterans of the armed forces of the United States is separately provided for in Section 4 of each of said three agreements.

11. That Exhibit A attached hereto, and delivered and exhibited herewith, contains and presents a true and correct copy of the frontpiece, preamble, [430] Sections 1(a), 1(b), 1(g), 2, 4(c) and 53, and the witnessing clause, of said agreement dated July 28, 1946, applicable to breweries in Northern California; and that said agreement was signed by the parties, unions and union officials whose names appear after the witnessing clause on said Exhibit A.

12. That by charter amendment filed June 8, 1948, the respondent Los Angeles Brewing Company changed its name to Main Street Corporation,

and the latter is the present correct name of said respondent.

Dated: This November 12, 1948.

JAMES M. CARTER,
United States Attorney,

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division,

/s/ JAMES C. R. McCALL, JR.,
Assistant U. S. Attorney,
Attorneys for Petitioners.

SCHEDULE 1

LOS ANGELES BREWING CO.

SUMMARY OF BOTTLE HOUSE PAYROLL
WEEKLY HOURS WORKED FROM PERIOD
BEGINNING OCTOBER 6, 1946, TO
MAY 24, 1947, INC.

Period	Number of Employees	Total Hours Worked	Average Hours Worked Per Em- ployee
Week ending October 12, 1946.....	195	9,445½	48
" " October 19, 1946.....	193	9,267	48
" " October 26, 1946.....	195	9,385	48
" " November 2, 1946.....	196	9,671½	49
" " November 9, 1946.....	204	9,129½	45
" " November 16, 1946.....	199	9,617	48
" " November 23, 1946.....	197	9,680½	49
" " November 30, 1946.....	207	9,135½	44
" " December 6, 1946.....	197	9,628	49
" " December 14, 1946.....	202	9,975½	49
" " December 21, 1946.....	201	9,938	49
" " December 28, 1946.....	206	8,916½	43
" " January 4, 1947.....	202	9,283½	46
" " January 11, 1947.....	208	8,893	43
" " January 18, 1947.....	199	9,769	49
" " January 25, 1947.....	211	10,323	49
" " February 1, 1947.....	208	11,672½	56
" " February 8, 1947.....	215	10,775	50
" " February 15, 1947.....	213	10,899	51
" " February 22, 1947.....	208	10,487	50
" " March 1, 1947.....	207	10,404	50
" " March 8, 1947.....	207	11,593	56
" " March 15, 1947.....	208	11,300	54
" " March 22, 1947.....	203	10,985½	54
" " March 29, 1947.....	207	10,421½	50
" " April 5, 1947.....	205	9,939½	48
" " April 12, 1947.....	206	11,514	56
" " April 19, 1947.....	207	11,547½	56
" " April 26, 1947.....	206	11,537½	56
" " May 3, 1947.....	204	9,849	48
" " May 10, 1947.....	205	11,540	56
" " May 17, 1947.....	207	11,660	56
" " May 24, 1947.....	206	11,582½	56

SCHEDULE 2

LOS ANGELES BREWING CO.

COMPUTATION OF WAGES WHICH WOULD HAVE BEEN PAID TO DOBBS AND ULLRICH IF WORKED AS BOTTLERS

AVERAGE NUMBER OF HOURS PER PAY WEEK—

OCTOBER 6, 1946, TO MAY 24, 1947

Period		Av. Hours Worked By All Bottlers....	40 Hr. Wk. Rate...	Straight Time	Overtime at Time and ½.....	Total Wages
Week Ending	October 12, 1946.....	48	\$54.50	\$54.50	\$16.35	\$ 70.85
" "	October 19, 1946.....	48	54.50	54.50	16.35	70.85
" "	October 26, 1946.....	48	54.50	54.50	16.35	70.85
" "	November 2, 1946.....	49	54.50	54.50	18.39	72.89
" "	November 9, 1946.....	45	54.50	54.50	10.22	64.72
" "	November 16, 1946.....	48	54.50	54.50	16.35	70.85
" "	November 23, 1946.....	49	54.50	54.50	18.39	72.89
" "	November 30, 1946.....	44	54.50	54.50	8.17	62.67
" "	December 6, 1946.....	49	54.50	54.50	18.39	72.89
" "	December 14, 1946.....	49	54.50	54.50	18.39	72.89
" "	December 21, 1946.....	49	54.50	54.50	18.39	72.89
" "	December 28, 1946.....	43	54.50	54.50	6.13	60.63
Change in rate 8.00 per wk. ef- fective Dec. 30	{ December 29, 1946.....	8	54.50	10.90	.....	10.90
" "	{ January 4, 1947.....	38	62.50	50.00	14.06	64.06
" "	January 11, 1947.....	43	62.50	62.50	7.03	69.53
" "	January 18, 1947.....	49	62.50	62.50	21.09	83.59
" "	January 25, 1947.....	49	62.50	62.50	21.09	83.59
" "	February 1, 1947.....	56	62.50	62.50	37.50	100.00
" "	February 8, 1947.....	50	62.50	62.50	23.44	85.94
" "	February 15, 1947.....	51	62.50	62.50	25.78	88.28
" "	February 22, 1947.....	50	62.50	62.50	23.44	85.94
" "	March 1, 1947.....	50	62.50	62.50	23.44	85.94
" "	March 8, 1947.....	56	62.50	62.50	37.50	100.00
" "	March 15, 1947.....	54	62.50	62.50	32.81	95.31
" "	March 22, 1947.....	54	62.50	62.50	32.81	95.31
" "	March 29, 1947.....	50	62.50	62.50	23.44	85.94
" "	April 5, 1947.....	48	62.50	62.50	18.75	81.25
" "	April 12, 1947.....	56	62.50	62.50	37.50	100.00
" "	April 19, 1947.....	56	62.50	62.50	37.50	100.00
" "	April 26, 1947.....	56	62.50	62.50	37.50	100.00
" "	May 3, 1947.....	48	62.50	62.50	18.75	81.25
" "	May 10, 1947.....	56	62.50	62.50	37.50	100.00
" "	May 17, 1947.....	56	62.50	62.50	37.50	100.00
" "	May 24, 1947.....	56	62.50	62.50	37.50	100.00

Total\$2,732.70

SCHEDULE 3

LOS ANGELES BREWING CO.

SUMMARY OF BREWERS PAYROLL WEEKLY
HOURS WORKED FROM SEPTEMBER 17 TO
NOVEMBER 6 AND NOVEMBER 25, 1946
TO MAY 24, 1947

Period	Number of Employees	Total Hours Worked	Average Hours Worked Per Employee
Sept. 17, 18, 19, 20—4 Days.....	39	1,597	41
Week Ending September 28, 1946....	38	1,781½	47
" " October 5, 1946.....	38	1,767½	47
" " October 12, 1946.....	38	1,737½	46
" " October 19, 1946.....	36	1,746	48
" " October 26, 1946.....	36	1,768½	49
" " November 2, 1946.....	39	1,740	45
November 4, 6, 6—3 days.....	39	1,110	28
Week Ending November 30, 1946....	39	1,490½	38
" " December 6, 1946.....	39	1,756	45
" " December 14, 1946.....	38	1,894	50
" " December 21, 1946.....	38	1,769	47
" " December 28, 1946.....	37	1,276	34
" " January 4, 1947.....	37	1,432	39
" " January 11, 1947.....	39	1,939½	50
" " January 18, 1947.....	39	1,783	46
" " January 25, 1947.....	39	1,835	47
" " February 1, 1947.....	38	1,794	47
" " February 8, 1947.....	39	1,986	51
" " February 15, 1947.....	39	1,830	47
" " February 22, 1947.....	39	1,827	47
" " March 1, 1947.....	38	1,726½	45
" " March 8, 1947.....	39	1,811	46
" " March 15, 1947.....	40	1,981	50
" " March 22, 1947.....	39	1,962	50
" " March 29, 1947.....	38	1,882	50
" " April 5, 1947.....	38	1,921	51
" " April 12, 1947.....	38	1,956	51
" " April 19, 1947.....	37	1,987	54
" " April 26, 1947.....	37	1,929½	52
" " May 3, 1947.....	39	1,875	48
" " May 10, 1947.....	39	2,027	52
" " May 17, 1947.....	39	1,827	47
" " May 24, 1947.....	38	1,925	51

SCHEDULE 4

LOS ANGELES BREWING CO.

COMPUTATION OF WAGES WHICH WOULD HAVE BEEN
PAID TO IOB IF WORKED AS BREWERS AVERAGE
NUMBER OF HOURS PER PAY WEEK SEPTEMBER 17 TO
NOVEMBER 6, 1946, AND NOVEMBER 25, 1946, TO
MAY 24, 1947

Period	Av. Hours Worked By All Brewers.....	40 Hr. Wk. Rate...	Straight Time	Overtime at Time and 1/2.....	Total Wages.....
Sept. 17, 18, 19, 20—4 Days.....	41	\$59.00	\$59.00	\$ 2.21	\$ 61.21
Week Ending September 28, 1946....	47	59.00	59.00	15.49	74.49
" " October 5, 1946.....	47	59.00	59.00	15.49	74.49
" " October 12, 1946.....	46	59.00	59.00	13.28	72.28
" " October 19, 1946.....	48	59.00	59.00	17.70	76.70
" " October 26, 1946.....	49	59.00	59.00	19.91	78.91
" " November 2, 1946.....	45	59.00	59.00	11.06	70.06
November 4, 5, 6—3 days.....	28	59.00	41.30	.....	41.30
" " November 30, 1946.....	38	59.00	56.05	.....	56.05
" " December 6, 1946.....	45	59.00	59.00	11.06	70.06
" " December 14, 1946.....	50	59.00	59.00	22.13	81.13
" " December 21, 1946.....	47	59.00	59.00	15.49	74.49
" " December 28, 1946.....	34	59.00	50.15	.....	50.15
" " December 29, 1946.....	8	59.00	11.80	.....	11.80
" " January 4, 1947.....	31	67.00	51.93	.....	51.93
" " January 11, 1947.....	50	67.00	67.00	25.13	92.13
" " January 18, 1947.....	46	67.00	67.00	15.07	82.07
" " January 25, 1947.....	47	67.00	67.00	17.59	84.59
" " February 1, 1947.....	47	67.00	67.00	17.59	84.59
" " February 8, 1947.....	51	67.00	67.00	27.64	94.64
" " February 15, 1947.....	47	67.00	67.00	17.59	84.59
" " February 22, 1947.....	47	67.00	67.00	17.59	84.59
" " March 1, 1947.....	45	67.00	67.00	12.56	79.56
" " March 8, 1947.....	46	67.00	67.00	15.07	82.07
" " March 15, 1947.....	50	67.00	67.00	25.13	92.13
" " March 22, 1947.....	50	67.00	67.00	25.13	92.13
" " March 29, 1947.....	50	67.00	67.00	25.13	92.13
" " April 5, 1947.....	51	67.00	67.00	27.64	94.64
" " April 12, 1947.....	51	67.00	67.00	27.64	94.64
" " April 19, 1947.....	54	67.00	67.00	35.17	102.17
" " April 26, 1947.....	52	67.00	67.00	30.15	97.15
" " May 3, 1947.....	48	67.00	67.00	20.10	87.10
" " May 10, 1947.....	52	67.00	67.00	30.15	97.15
" " May 17, 1947.....	47	67.00	67.00	17.59	84.59
" " May 24, 1947.....	51	67.00	67.00	27.64	94.64
Total					\$2,742.35

EXHIBIT "A"

CONTRACT

Between Joint Local Executive Board of California, Comprising Bottlers Local Union No. 896, Brewers, Maltsters & Yeast Workers Local Union No. 893, Brewery Drivers & Helpers Local Union No. 888, Brewery Shipping, Receiving Clerks and Checkers Local Union No. 884, Affiliated with International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, Effective July 28, 1946.

Contract

Whereas, the Joint Local Executive Board of California, Locals Nos. 888, 893, 896, and 884 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, state and allege that as of the date hereof, said joint Local Executive Board of California is the designated and selected representatives of the employees in the brewing, bottling, delivery, shipping and receiving departments of all the breweries of Northern California, for the purposes of collective bargaining with respect to rates of pay, wages, hours of labor and other conditions of employment, which said specific statement and allegation constitutes the material consideration to the breweries herein:

Now, Therefore, after presentation of evidence of such representation and in consideration of the mutual promises herein contained: it is agreed:

Section 1. (a) Only members in good standing

who are members of Local Union No. 893 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America shall be employed as brewers in the brewing department, including all basements, platforms, and wash houses used in connection with the operation of the brewing department.

(b) Only members in good standing who are members of the Bottlers Local Union No. 896 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America shall be employed as bottlers in the bottling department at the brewery, including all basements, platforms, storage and yards used in connection with the operating of the bottling departments in positions where bottlers are now employed, or in those branches where employer may require the employment of a steady crew to perform bottlers' work. [436]

* * *

(f) This contract shall cover only employees who perform their services principally within the State of California for the respective breweries.

(g) Provided, however, in those cases in which the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America permit mixed branches, i.e., branches in which members who normally would belong to Local Unions Nos. 893, 896, 888 and 884 but are members of a mixed branch of any of the said local unions, only members in good standing who are members of such mixed branch of any said local unions shall be employed in the capacities hereinabove set out, and

provided further that all unloading, and loading of railroad cars on or within two blocks of the brewery premises shall be done by members of one of the aforesaid unions or branches thereof.

Section 2. All employees shall be obtained and hired through the respective local unions, and branches thereof to which the employees in said department are required to belong, provided, however, that should said respective local unions be unable to provide the necessary satisfactory employees, then and in that event, said employees may be obtained from any source, provided further, however, that said employees so obtained through other sources shall secure a permit card from said respective local union within forty-eight (48) hours after commencing work and said union shall deliver such permit card to such employee.

The employer in those cases where he is required hereunder to employ only members of the respective unions hereinbefore mentioned, except local 896, shall, in all cases involving regular employees as distinguished from employees required for temporary employment, have the right of selection from the list of unemployed union members or card permit men, which list shall be maintained by and furnished by the Secretary of each such local union to the employer on request.

* * *

Section 4. (c) Any employee, other than a temporary employee, leaving his position to enlist in or be inducted into the Armed Land and Naval

forces of the United States under the provisions of the "Selective Training [437] Service Act of 1940" shall, upon completion of their period of training under Section 3(b) of that Act or their period of enlistment, be restored to their former positions, according to seniority held at the time of induction or enlistment, provided that they are capable of performing the duties of such position and have reported for work within ninety (90) days following their discharge from such service. Upon the reinstatement of any such person to his position, employer shall be permitted to discharge such employee as such returned service man shall displace.

* * *

Section 53. This contract shall be in full force and effect from the date hereof until March 1, 1947.

In Witness Whereof, the parties have hereunto set their hands and seals by their respective representatives, this 28th day of July, 1946.

This contract applies only to breweries in northern California.

For the Employers:

California State Brewers Institute for Institute
Members in Northern California by James G.
Hamilton, Secretary.

For the Employees:

Joint Local Executive Board of California, by
Martin Christen, Secretary.

For Grace Bros. Brewery, Ltd., in Northern
California, by James M. McRoberts.

Golden West Brewing Co.

Thomas G. Walker

Eldorado Brewing Co.

A. J. Rothenbrush, Pres.

Approved by:

Wm. H. Ahern

Sec'ty. Bottlers Local Union No. 896.

Henry Jenichen

Sec'ty. Brewers, Maltsters and Yeast Workers
Local Union No. 893. [438]

Martin Christen

Sec'ty. Brewery Drivers and Helpers Local
Union No. 888.

Clay Bissant

Sec'ty. Brewery Shipping, Receiving Clerks
and Checkers Local Union No. 884. [439]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,

Southern District of California—ss.

Grace E. McGimpsey, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that her business address is 600 Post Office and Court House, Los Angeles, California; that she is over

the age of eighteen years, and is not a party to the above-entitled action;

That on November 12, 1948, she deposited in the United States Mails in the Post Office at 312 No. Spring Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Petitioners' Requests for Admissions Under F.R.C.P. Rule 36, addressed to: O'Melveny & Myers, Esqs., 433 So. Spring Street, Los Angeles 14, California, as attorneys for Los Angeles Brewing Company; and P. H. McCarthy, Jr., 518 Balboa Bldg., San Francisco 5, California, as Attorney for Joint Local Executive Board of California, Bottlers Local Union No. 896, and Brewers, Maltsters & Yeast Workers Union No. 893, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Walter Eckberg, Anthony Zeigler, Thomas Vacca and Elmer Schaffer, at their last known addresses, at which places there is a delivery service by the United States Mails from said Post Office.

/s/ GRACE E. McGIMPSEY. [440]

Subscribed and Sworn to before me this 12th day of November, 1948.

EDMUND L. SMITH,

Clerk, U. S. District Court,
Southern District of Calif.,

By /s/ EDW. L. DREW,
Deputy.

[Endorsed]: Filed Nov. 12, 1948. [441]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 6322-M Civil

FRED ELIA IOB, et al.,

Petitioners,

vs.

LOS ANGELES BREWING COMPANY, INC.,
et als.,

Respondents,

JOINT LOCAL EXECUTIVE BOARD OF CAL-
IFORNIA, an unincorporated association,
Additional Respondent.

REPLY TO PETITIONERS' REQUESTS FOR
ADMISSIONS UNDER F.R.C.P. RULE 36

Comes Now Additional Respondent and replying
to petitioners' requests for admissions, admits and
denies as follows:

1. Replying to paragraphs 1, 2, 3, 4 and 5, Addi-
tional Respondent states that it has not access to the
original records and therefore cannot state whether
the alleged facts set out on the schedules referred
to in said paragraphs are true or false. However,
Additional Respondent will not question the truth
of said alleged facts if Petitioners and Respondents
are in agreement concerning the said alleged facts,
but admit the same. [442]

2. Replying to paragraph 6, Additional Respondent denies the allegation therein contained.

3. Replying to paragraph 7, Additional Respondent denies the allegations therein contained and do so for the reason that the phrase "two such collective bargaining agreements" can only refer to paragraph 6.

4. Replying to paragraph 8, Additional Respondent denies the allegations therein contained and does so for the reason that the phrase "another collective bargaining agreement" can only refer to paragraphs 6 and 7.

5. Replying to paragraph 9, Additional Respondent denies the allegations therein contained because the phrase "said three agreements" can only refer to paragraphs 6, 7 and 8. They, however, admit that the agreements referred to in sub-paragraphs (a), (b) and (c) of paragraph 9 are true copies of the agreements the purport to be but not the agreements referred to in paragraphs 6, 7 and 8 about which Additional Respondent knows nothing.

6. Answering paragraph 10, Additional Respondent states that the re-employment of veterans of the armed forces of the United States is not "separately provided for in Section 4" and allege the true fact to be that such re-employment is provided for in Section 4 (c) not separately but subject to the terms and provisions of the entire agreement.

7. Replying to paragraphs 11 and 12, Additional

Respondent admits the allegations in said paragraph contained.

Dated November 18, 1948.

/s/ P. H. McCARTHY, JR.,
Attorney for Additional
Respondent. [443]

State of California,
City and County of San Francisco—ss.

P. H. McCarthy, Jr., being first duly sworn, deposes and says: That he is attorney for The Joint Local Executive Board of California, Additional Respondent in the above entitled action; that he has read the foregoing "Reply to Petitioners' Requests for Admissions Under F.R.C.P. Rule 36" and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information or belief and as to those matters he believes it to be true.

/s/ P. H. McCARTHY, JR.

Subscribed and sworn to before me this 19th day of November, 1948.

[Seal] CATHERINE E. KEITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires December 16, 1950. [444]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of California,

City and County of San Francisco—ss.

H. O'Neill, being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of the City and County of San Francisco, State of California, and not a party to the within action.

This affiant's business address is 518 Balboa Building, 593 Market Street, San Francisco 5, California.

That affiant served a copy of the attached "Reply to Petitioners' Requests for Admissions Under F. R. C. P. Rule 36" by placing said copy in an envelope addressed to James C. R. McCall, [445] Esq., Assistant U. S. Attorney, 600 Federal Building, Los Angeles 12, California, and O'Melveny & Myers, Esqs., 433 So. Spring Street, Los Angeles 14, California, which envelope was then sealed and postage fully prepaid thereon, and thereafter was on November 19, 1948, deposited in the United States mail at San Francisco.

That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

/s/ H. O'NEILL.

Subscribed and sworn to before me this 19th day of November, 1948.

[Seal] CATHERINE E. KEITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires December 16, 1950.

[Endorsed]: Filed November 20, 1948. [446]

In the District Court of the United States for the
Southern District of California, Central Division

No. 6322-M Civil

FRED ELIA IOB, et al.,

Petitioners,

vs.

LOS ANGELES BREWING COMPANY, INC.,
et al.,

Respondents.

REPLY TO PETITIONERS' REQUESTS FOR
ADMISSIONS UNDER FEDERAL RULES
OF CIVIL PROCEDURE, RULE 36

Respondent Los Angeles Brewing Co. (incorrectly named in the petition herein as Los Angeles Brewing Company, Inc., and now Main Street Corporation, a corporation), for its reply to petitioners' requests for admissions, admits and denies and alleges as follows:

1. Answering Paragraph 1, admits that Schedules 1, 2, 3 and 4, photocopies of which are attached to petitioners' requests for admissions, were prepared by Los Angeles Brewing Co. in response to interrogatories propounded by petitioners to said company on May 29, 1947, and filed herein subsequent to that date; denies that said schedules were prepared by or in behalf [446A] of Los Angeles Brewing Company or that interrogatories were propounded by petitioners to said Los Angeles Brewing Company.

2. Answering Paragraph 2, admits that Schedule 1 is a true and correct summary of the average number of hours of work performed by bottlers in the employ of Los Angeles Brewing Co. each week between October 6, 1946, and May 24, 1947; denies that Schedule 1 is a true or correct statement or summary of the average number of hours of work performed by bottlers in the employ of Los Angeles Brewing Company.

3. Answering Paragraph 3, admits that Schedule 2 is a true and correct statement of the individual average total wages paid each week by Los Angeles Brewing Co. to bottlers for work performed by them in its employ between October 6, 1946, and May 24, 1947; admits that Schedule 2 contains a correct estimate of the wages which would have been paid by Los Angeles Brewing Co. to petitioners Dobbs and Ulrich, respectively, each week during said period if they had been employed by Los Angeles Brewing Co. as bottlers and if they

had worked the average number of hours worked by the other bottlers employed by the Los Angeles Brewing Co. between said dates; denies that Schedule 2 is a true or correct statement of wages paid by Los Angeles Brewing Company or that bottlers were employed by said company between October 6, 1946, and May 24, 1947, and denies that said Schedule relates in any way to Los Angeles Brewing Company.

4. Answering Paragraph 4, admits that Schedule 3 is a true and correct summary of the average number of hours of work performed each week by brewers in the employ of Los Angeles [446B] Brewing Co. between September 7, 1946, and November 6, 1946, and between November 25, 1946, and May 24, 1947; denies that said Schedule 3 relates in any way to Los Angeles Brewing Company.

5. Answering Paragraph 5, admits that Schedule 4 is a true and correct statement of the individual average total wages paid each week by Los Angeles Brewing Co. to brewers for work performed by them in its employ between September 7, 1946, and November 6, 1946, and between November 25, 1946, and May 24, 1947, and that said schedule contains a correct statement of the wages which would have been paid by Los Angeles Brewing Co. to petitioner Iob each week during said two periods if he had been employed by it as a brewer and if he had worked the average number of hours worked by the other brewers employed by Los Angeles

Brewing Co. during said periods; denies that said schedule relates in any way to Los Angeles Brewing Company.

6. Answering Paragraph 6, denies that during the years 1946 or 1947 respondent Los Angeles Brewing Co. was a member of the California State Brewers Institute; denies that said Institute acted as a collective bargaining representative for Los Angeles Brewing Co. in negotiating with the respondent Joint Local Executive Board of California or effecting with it certain working agreements dated July 28, 1946, or April 1, 1947; denies that Los Angeles Brewing Company was during the years 1946 or 1947 a member of the California State Brewers Institute and denies that said institute acted as a collective bargaining representative for Los Angeles Brewing Company in negotiating with the respondent Joint Local Executive Board of California or affecting with it certain working agreements dated July 28, 1946, or April [446C] 1, 1947; alleges that Los Angeles Brewing Company is a California corporation, Articles of Incorporation of which were first filed on May 5, 1948.

7. Answering Paragraph 7, denies the allegations thereof, except admits that on or about July 28, 1946, Los Angeles Brewing Co. signed a collective bargaining agreement establishing wages, hours and working conditions covering the employment of bottlers, brewers, shipping drivers and helpers, and checkers and shipping clerks in the employ of Los Angeles Brewing Co. with the Joint Local

Executive Board of California, Locals Nos. 893, 896, 884 and 203 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and admits that the contract last above referred to was also signed by California State Brewers Institute for members of said Institute in Southern California.

8. Answering Paragraph 8, denies the allegations thereof, except admits that on or about April 1, 1947, respondent Joint Local Executive Board of California and Locals Nos. 203, 683, 884, 888, 893 and 896 and the California State Brewers Institute and Los Angeles Brewing Co. and numerous other breweries and distributors in the State of California entered into a collective bargaining agreement establishing wages, hours and working conditions covering the employment of brewers, bottlers, drivers and shipping clerks employed by the breweries and distributors and that said April 1, 1947, collective bargaining contract last above referred to supplanted and took the place of the agreement dated July 28, 1946, between Los Angeles Brewing Co. and Joint Local [446D] Executive Board of California and Locals 893, 896, 884 and 203.

9. Answering Paragraph 9, denies the allegations thereof, except admits that the collective bargaining contracts referred to in subparagraphs (a), (b), and (c) of said Paragraph 9 are true copies of the agreements which they purport to be.

10. Answering Paragraph 10, denies that the re-

employment of veterans of the armed forces of the United States is separately provided for in Section 4 of each or any of said three agreements; alleges the true fact to be that such reemployment is provided for in Section 4 of each of said agreements not separately but subject to all of the terms and provisions and conditions of the entire agreement, including the provisions of Sections 1 and 2 of said agreement.

11. Answering Paragraph 11, admits the allegations in said paragraph contained.

12. Answering Paragraph 12, admits that by charter amendment filed June 8, 1948, respondent Los Angeles Brewing Co. changed its name to Main Street Co.; alleges that Main Street Co. is not engaged in the brewing business and is not the employer of any brewers or bottlers; alleges that on or about June 2, 1948, Los Angeles Brewing Company purchased and acquired all of the assets of Los Angeles Brewing Co. [446E]

Dated: December 8, 1948.

O'MELVENY & MYERS,
W. W. ALSUP,

By /s/ WILLIAM W. ALSUP,
Attorneys for Respondent Los Angeles Brewing Co.

(Now Main Street Corporation and incorrectly named as Los Angeles Brewing Company, Inc.) [446F]

At a stated term, to wit: The September Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Thursday, the 23rd day of December, in the year of our Lord one thousand nine hundred and forty-eight.

Present:

The Honorable: Paul J. McCormick, District Judge.

No. 6322-M Civil

FRED ELIA IOB,

vs.

L. A. BREWING CO., et al.

For re-setting for trial or disposition; James C. R. McCall, Jr., Ass't U. S. Att'y, appearing as counsel for plaintiff; Wm. Alsup, Esq., appearing as counsel for L. A. Brewing Co.; Court makes a statement and reads Memorandum of Decision and rules in favor of respondent, and that respondent prepare findings and judgment.

[Endorsed]: Filed Dec. 8, 1948. [447]

United States District Court, Southern District of
California, Central Division

No. 6322-M. Civil

FRED ELIA IOB, et al.,

Petitioners,

vs.

LOS ANGELES BREWING COMPANY, INC.,
et al.,

Respondents,

JOINT LOCAL EXECUTIVE BOARD OF CAL-
IFORNIA, an Unincorporated Association,
Additional Respondent.

MEMORANDUM OF DECISION

This action is predicated upon the Selective Training and Service Act of 1940 as amended (50 U.S.C.A. App., Section 301 et seq), and the Service Extension Act of 1941, (50 U.S.C.A. App., Section 351 et seq.).

This court after appropriate full hearings has heretofore entered an order under date of September 3, 1947, denying an injunction requiring the respondent Los Angeles Brewing Company, a corporation, to restore the petitioners to employment in the brewery of respondent company at Los Angeles, California, for reasons stated by the court from the bench in this cause on April 7, 1947, and contained in the reporter's transcript of proceedings filed herein May 9, 1947.

The sole issue remaining undecided is whether the discharge of the petitioners was "without cause" within [448] the meaning of subsection (c) of Section 308 of the Selective Training and Service Act of 1940 as amended, *supra*.

The two Acts will for brevity be characterized herein as the Veterans Protective Acts; Los Angeles Brewing Company, a corporation, will be referred to as the respondent company. The following factual situation is disclosed by the record before the court: Petitioner Fred Elia Iob was first employed by the respondent company in March of 1943, as a brewer. The respondent company first employed as bottlers petitioner Samuel M. Dobbs in July of 1937, and petitioner Waldemar F. Ullrich in February of 1937. Each petitioner entered the armed services during the recent war for varying periods, and thereby became eligible for employment protection under the veterans protective acts. Prior to military service petitioner Iob was a member of Brewers, Maltsters and Yeast Workers Local Union No. 7, and petitioners Dobbs and Ullrich were members of Bottlers Local Union No. 293; both unions being affiliated with the Brewery Workers International Union.

The Brewery Workers International Union prior to July 27, 1946, was for a long period affiliated with the American Federation of Labor, then it became an independent union for a time, and finally it affiliated with the Congress of Industrial Organizations. Until July 27, 1946, the respondent company

pursuant to union contract, required that all brewers and bottlers in its employ be members of the aforesaid International Brewery Workers Locals Nos. 7 and 293. Prior to that time a majority of the workers of the category specified saw fit to resign from Locals Nos. 7 and 293, respectively, and to organize and join unions denominated as "Brewers, Maltsters and Yeast Workers Local Union No. 893" and "Bottlers Union No. 896"; both affiliates of the International Brotherhood of Teamsters, Chauffeurs [449] and Warehousemen and Helpers of America (American Federation of Labor). Conformable to a duly negotiated union contract respondent company from the date of July 28, 1946 has required that all brewers and bottlers be members of the last named "Teamsters" locals Nos. 893 and 896, respectively. The two locals of the Brewery Workers International Union subsequent to July 28, 1946, charged the respondent company with an unfair labor practice, aided and abetted by the two aforesaid "Teamsters" locals, before the National Labor Relations Board. But as far as we are advised, no hearing or decision has come from that body. These two locals also sought to invoke the processes of the State courts of the State of California in a labor organization dispute by suing to compel respondent company (and other brewery concerns) to employ only workers in good standing with such two locals of the Brewery Workers International Union. In an action in the Superior Court of the State of California in and for the County of Los Angeles in

Cause Number 517,511, by an order dated August 15, 1946, the State court refused to take such action. A strike was thereafter called by the Brewery Workers International Union locals, and a picket line was placed in respondent company's plant in Los Angeles, California, from about September 23, 1946, to approximately March 27, 1947. Notwithstanding such strike, the "Teamsters" locals continued to work and have continued to operate respondent company's plant during all applicable times with which we are concerned in this proceeding.

After the completion of their military service the three petitioners returned and were re-employed by respondent company until discharged as follows: Iob: On September 9, 1946 (and after discharge on September 17, 1946), again on November 6, 1946; Dobbs: On January 2, 1946; and Ullrich [450] on April 29, 1946. None of the petitioners would join the appropriate "Teamsters" locals as required by the contract between the respondent company and the "Teamsters" locals on July 28, 1946.

There is no indication in the record before us that the "Teamsters" locals would not have accepted application for membership on the part of the three petitioners. To the contrary, the agent of the "Teamsters" locals solicited and importuned all petitioners to join and affiliate in such contracting labor organizations; in fact it is clear from the record that affiliation with the contracting "Teamsters" locals is just what was desired of the

three petitioners by both the respondent company and its contracting "Teamsters" locals.

After the solicitations and importunities by the agent of the "Teamsters" locals and upon refusals on the part of the three petitioners to affiliate with the contracting labor union organizations and upon demand by the representative of such contracting labor union organizations the respondent company under pressure by such labor union organizations discharged the petitioners, as above noted.

This action instituted by the United States Attorney on behalf of the three petitioners followed. Subsequent to the hearing on April 7, 1947, in which the court refused to grant a mandatory injunction directed to the respondent company, the United States Attorney by an amended complaint filed May 28, 1947, brought into the cause the two "Teamsters" locals and the Joint Local Executive Board of California, of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America (American Federation of Labor) as parties defendant. [451]

The purpose of the veterans protective acts was to give the discharged veteran as nearly as possible a restoration of the employment situation which he would have had if he had never entered the military service. As stated by the Supreme Court in *Fishgold v. Sullivan Drydock and Repair Corporation*, 328 U.S. 275, "Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of

seniority to his old position or to a position of like seniority mean no more." Furthermore, for the statutory year indicated in Section 308 (e) of the Act, the restored rights of the veteran "could not be altered adversely by the usual processes of collective bargaining or of the employer's administration of general business policy." *Trailmobile v. Whirls*, 331 U.S. 40, 58. This latter statement by the Supreme Court has been interpreted to mean (in the light of the Selective Training and Service Act of 1940 as amended, *supra*) that "* * * the employee's absence in war service is bound by the non-discriminatory arrangements made between the bargaining unit and the employer during his absence." *Gauweiler v. Electric Stop Nut Corp.*, 162 F. 2d 448, 451, (C.C.A. 3, 1947). It is true that our Court of Appeals has taken a different point of view from that in the Third Circuit as to the rights of veterans in this particular phase in relation to the "non-discriminatory arrangements made between the bargaining unit and the employer" during the veteran's absence in military service. See *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 169 F. 2d 252, (C.C.A. 9, 1948). Both decisions, however, we think, are in harmony with the principle that the veteran is to be restored as nearly as possible to the same position he would have rightfully occupied if he had not been called [452] into military service.

It would seem that the failure of an employee to obey the lawful and reasonable instructions of his employer under Section 308-(e) of the Act might

constitute sufficient "cause" for discharge. It has been stated that "the cause intended by the statute does not have to be legal cause. It may be such cause as a fair-minded person may act upon, and where such action is not arbitrarily taken with a purpose or as an excuse to avoid the statute, it is cause within the meaning thereof." *Keserich v. Carnegie Illinois Steel Corp.*, 163 F. 2d 889, (C.C.A. 5). A recent appellate decision has held that a veteran who on his return refused to join the union which had a closed shop agreement with the veteran's employer, might be properly discharged by the employer, the veteran's action constituting sufficient cause under Section 308-(e) of the Act, *supra*. The court in the decision referred to had this further to say:

"If Chatillon had insisted upon retaining Kemp in employment it would have breached the terms of its contract with the union. Moreover, it would have run a substantial risk of disrupting its labor relations and it might reasonably have anticipated a strike at its plant." *Kemp v. John Chatillon & Sons, Inc.*, 169 F. 2d 203, 207, (C.C.A. 3, 1948).

The striking similarity of the situation of this case and the one in the proceedings at bar is obvious.

While some conflict can be found in the decisions of the federal courts of appeal in their interpretations of phases of the veterans protective acts, uniformity and harmony seem to exist between the authoritative rulings on the central proposition that

is adhered to, namely, that returning veterans cannot be denied restoration of the employment situation as nearly as possible which they would have had if they had never entered the military service.

Cases in which seniority among employees was the issue are immaterial and of no help in solving the problem before us in this action. Here there is no claim of denial of seniority rights or of insurance or other benefits.

As the court stated in *Fishgold v. Sullivan Corp.* supra: “* * * a veteran on his return is entitled to his old “position” or its equivalent * * * unless of course the private employer’s ‘circumstances have so changed as to make it impossible or unreasonable’ to restore him.”

It appears that petitioners’ right to continued employment under the veterans protective acts was not absolute. Discharge was justifiable for cause, and cause might be in the form of failure to comply with existing labor legislation. All three petitioners were wanted as workers by respondent company and could have remained employed by joining the “Teamsters” locals. They refused, apparently on principle. The right to retain employment entertaining such principle was not legislatively guaranteed at the time of petitioners’ decision. See 29 U.S.C.A., Section 141 et seq.

We conclude, under the record and in the light of decisional authority, that the petitioners’ refusal to join the contracting “Teamsters” union locals was adequate grounds for their discharge, and under

such situation the respondent company should not be required to pay wages to petitioners.

Dated December 23, 1948.

/s/ PAUL J. McCORMICK,
U. S. District Judge.

[Endorsed]: Filed Dec. 23, 1948. [454]

In the District Court of the United States for
the Southern District of California, Central
Division

No. 6322-M Civil

FRED ELIA IOB, et al.,

Petitioners,

vs.

LOS ANGELES BREWING COMPANY, INC.,
a corporation, et al.,

Respondents.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled cause came on regularly for trial before the Honorable Paul J. McCormick, Judge of the above entitled court, on April 1, 1947, plaintiffs and defendants being represented by their respective attorneys of record. Evidence, both oral and documentary was introduced and the cause argued and thereafter under date of September 3, 1947, this court entered an order denying the petitioners' request for a mandatory injunction requiring the respondent employer to reinstate the peti-

tioners to their former positions, which injunction was denied for reasons stated by the court from the bench in this cause on April 7, 1947, and contained in the reporter's transcript of proceedings filed in the proceedings of this cause on [455] May 9, 1947. The cause was continued from time to time thereafter for disposition of the issue whether the discharge of the petitioners was "without cause" within the meaning of subsection (c) of Section 308 of the Selective Training and Service Act of 1940 as amended (50 U.S.C.A. App., Section 301 et seq.). The parties by their respective attorneys have submitted additional pleadings and arguments to the court, and the court being fully advised in the premises and having fully considered the evidence submitted in this cause, and the arguments and briefs of counsel, now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The petition herein is filed under the provisions of Section 8-(e) of the Selective Training and Service Act of 1940 as amended (50 U.S.C.A. App., Section 308-(e)) and Section 7 of the Service Extension Act of 1941 (50 U.S.C.A. App., Section 357).

2. Los Angeles Brewing Co. (hereinafter referred to as the respondent company) employed petitioner Fred Elia Iob as a brewer in March of 1943, and petitioners Samuel M. Dobbs and Walde-mar F. Ullrich as bottlers in July of 1937 and February of 1937 respectively; petitioners left these positions, which were other than temporary posi-

tions of employment, on February 24, 1945, January 17, 1942 and May 9, 1942, respectively, in order to enter upon military service in the United States Army, which each did promptly thereafter. Each of petitioners satisfactorily completed his period of training and service and received a certificate thereof in the form of an honorable discharge from the [456] United States Army. Within 90 days after receiving his said honorable discharge each of the three petitioners returned and was reemployed in his former position by respondent company as follows: Iob: On September 9, 1946, and (after discharge on September 17, 1946) again on November 5, 1946; Dobbs: On January 2, 1946; and Ullrich: On April 29, 1946.

3. Prior to entry on military service petitioner Iob was a member of Brewers, Maltsters and Yeast Workers Local Union No. 7, and petitioners Dobbs and Ullrich were members of Bottlers Local Union No. 293, both of which unions were affiliated with the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America. Such union membership was required as a condition of employment at the respondent company at all times the petitioners were employed by respondent company up to about July 26, 1946. Until the year 1941 the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America was affiliated with the American Federation of Labor and from 1941 until sometime in the year 1946 and prior to July 26, 1946, it operated as an independent union; in 1946 and shortly prior to July 26, 1946,

said union affiliated with the Congress of Industrial Organizations.

4. Prior to July 26, 1946, a majority of the respondent company's workers employed as brewers and bottlers resigned from Locals Nos. 7 and 293, respectively, and organized and joined unions denominated as Brewers, Maltsters and Yeast Workers Local Union No. 893 and Bottlers Union No. 896 (hereinafter sometimes referred to as the "Teamsters" locals), both affiliates of the Joint Local Executive Board of California and of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen [457] and Helpers of America (American Federation of Labor).

5. On July 28, 1946, the respondent company and other breweries negotiated a collective bargaining contract with the Joint Local Executive Board of California. The National Labor Relations Board has not determined that the making of such contract violated the National Labor Relations Act (29 U.S.C. Secs. 158 et seq.), but to the contrary has refused to issue a complaint on and has ordered the dismissal of charges filed by Locals 7 and 293 of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, affiliated with the Congress of Industrial Organizations.

6. On July 28, 1946, the respondent company (and the other breweries in Southern California) duly negotiated said collective bargaining agreement with the said Joint Local Executive Board of California, comprising amongst others, "Teamster" locals 893 and 896. A copy of said agreement is

attached to and filed as Exhibit "A" to the Answer of the respondent company. Said contract provides in part as follows:

"Section 1. (a) Only members in good standing who are members of Local Union No. 893 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America shall be employed as brewers in the brewing department, including all basements, platforms and wash houses used in connection with the operating of the brewing department.

"(b) Only members in good standing who are members of Bottlers' Local Union No. 896 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America shall be employed as bottlers in the bottling department at the brewery, including all basements, platforms, storage, and yards used in connection with operation of the bottling [458] department in positions where bottlers are now employed, or in those branches where employer may require the employment of a steady crew to perform bottlers' work.

"* * *

"Section 4.

"(b) In the case of any employee inducted into the land or naval forces of the United States of America for training and service under the Selective Training and Service Act of 1940, if such person shall have left his position, other than a temporary position, in order to perform such training and service, and shall have received the certificate prescribed by said Act, and if he is still qualified to

perform the duties of such position and makes application for employment within sixty (60) days after he is relieved from such training and service, the employer shall restore such person to such position or to a position of like seniority, status and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Any person restored to a position in accordance herewith shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces and when so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the [459] employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause one year after such restoration. Upon the re-instatement of any such person to his position, employer shall be permitted to discharge such employee as such returned service man shall displace."

Said contract remained in full force and effect until April 1, 1947, at which time a new contract was entered into by respondent company with said Joint Local Executive Board of California and the "Teamster" locals 893 and 896. A copy of said contract is attached to the answer of respondent company as Exhibit "B." Said contract provides in part as follows:

"Section 1. (a) Only members in good standing

who are members of local union 893 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, shall be employed as brewers in the brewing departments, including all basements, platforms, and wash houses used in connection with the operation of the brewing department.

“(b) Only members in good standing who are members of Bottlers local union 896 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America shall be employed as bottlers in the bottling department at the brewery, including all basements, platforms, storage and yards used in connection with the operating of the bottling departments in positions where bottlers are now employed, or in those branches where employer may require the employment [460] of a steady crew to perform bottlers work.

“* * *

“Section 4.

“(d) Any employe, other than a temporary employe, leaving his position as an inductee of the Armed Land and Naval Forces of the United States under the provisions of the ‘Selective Training Service Act of 1940,’ shall, upon completion of their period of training under Section 3-(b) of that Act or that period of enlistment, be restored to their former positions, according to seniority held at the time of induction, provided that they are capable of performing the duties of such position and have reported for work within 90 days following their discharge from such service. Upon the reinstatement

ment of any such person to his position, employer shall be permitted to discharge such employe as such returned serviceman shall displace.”

7. Locals 7 and 293 of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America affiliated with the Congress of Industrial Organizations (hereinafter referred to as Brewery Workers International Union) sought to invoke the processes of the State courts of the State of California by suing to compel respondent company (and other breweries) to employ only members in good standing of local unions 7 and 293 of said Brewery Workers International Union in the brewery and bottling departments of said breweries. In a proceeding in the Superior Court of the State of California in and for the County of Los Angeles in Cause No. 517,511, by an [461] order dated August 15, 1946, the State Court refused to take such action. A strike was thereafter called by said Brewery Workers International Union and a picket line was placed in front of respondent company's plant in Los Angeles, California, from approximately September 23, 1946, to approximately March 27, 1947. Despite such strike the “Teamster” locals continued to work and operate respondent company's plant at all times material in this proceeding.

8. At all times material herein, petitioners Dobbs and Ullrich have been members of Local No. 293 of said Brewery Workers International Union, and petitioner Iob has been a member of Local No. 7 of

said Brewery Workers International Union. None of petitioners has at any time been a member of the "Teamsters" Locals Nos. 896 or 893 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

9. Petitioners Dobbs and Ullrich were discharged by respondent company on or about October 5, 1946. Petitioner Iob was discharged on or about September 17, 1946, and, after a brief period of reemployment, was again discharged on November 25, 1946. Said discharges occurred by reason of demands therefor made upon the respondent employer by said "Teamster" locals 896 and 893; said demands were made for the reason that petitioners Dobbs and Ullrich were not and neither of them was a member in good standing of Local Union No. 896 and petitioner Iob was not a member in good standing of Local Union No. 893, as required by the contract dated July 28, 1946, between respondent company and the Joint Local Executive Board of California. Each of petitioners was offered membership in and was solicited and importuned to join the appropriate "Teamsters" local and each [462] refused said offer and at all times material herein refused to join said Local Unions Nos. 896 or 893 as required by the said contract dated July 28, 1946.

10. Upon refusals on the part of the three petitioners to affiliate with the contracting labor union organizations and upon demand by the representative of the contracting labor union organizations the respondent company discharged the petitioners.

The respondent company was threatened with strikes and economic pressure if the demands to discharge the petitioners were not complied with.

11. None of petitioners is entitled to any benefits in the petition herein for the reason that none of petitioners was a member of the labor unions which had the contract with respondent company hereinabove referred to, and each of petitioners refused to join said unions despite knowledge that without such union membership they could not continue in their respective jobs with respondent company.

12. None of petitioners was discharged without cause. Petitioners were and each of them was discharged because of economic pressure and the enforced contractual mandate of the union with whom respondent company had said collective bargaining agreement. The respondent company would have violated its contract with the union if it had failed to discharge any employee who refused to join said union.

CONCLUSIONS OF LAW

The Court concludes:

1. The discharge of petitioners, or any of them, by respondent company were not discharged without cause. [463]

2. The discharge of petitioners, or any of them, by respondent company were not unlawful.

3. Petitioners are not and none of them is entitled to any compensation from respondent com-

pany for loss of wages or otherwise as prayed in their petition.

4. Petitioners are not and none of them is entitled to be restored to their former positions and the prayer for mandatory injunction is accordingly denied.

5. Said findings having been made upon issues which are determinative of the cause, any further finding or findings upon issues other than those embraced in the foregoing findings would be immaterial and are not made for that reason.

6. The respondents are entitled to a judgment that petitioners take nothing by their action.

Let judgment be entered accordingly.

Dated December 31st, 1948.

/s/ PAUL J. McCORMICK,
Judge.

Approved as to Form as provided in Rule 7 of Rules of Procedure for the District Court of the United States for the Southern District of California.

/s/ JAMES C. R. McCALL, JR.,
Assistant U. S. Attorney,
Attorney for Petitioners.

/s/ P. H. McCARTHY, JR.,
Attorney for Additional
Respondents.

[Endorsed]: Filed Dec. 31, 1948. [464]

In the District Court of the United States for
the Southern District of California Central
Division

No. 6322-M Civil

FRED ELIA IOB, et al.,

Petitioners,

vs.

LOS ANGELES BREWING COMPANY, INC.,
a corporation, et al.,

Respondents.

JUDGMENT

The court having made its findings of fact and conclusions of law and having duly signed and caused to be filed its Memorandum of Decision,

Now, Therefore, It Is Ordered, Adjudged and Decreed that petitioners take nothing by their action.

Dated December 31st, 1948.

/s/ PAUL J. M. McCORMICK,
Judge.

Approved as to Form, as provided in Rule 7 of Rules of Procedure for the District Court of the United States for the Southern District of California.

/s/ JAMES C. R. McCALL, JR.,
Assistant U. S. Attorney,
Attorneys for Petitioners.

/s/ P. H. McCARTHY, JR.
Attorneys for Additional
Respondents.

Judgment entered Dec. 31, 1948.

Docketed Dec. 31, 1948.

[Endorsed]: Filed Dec. 31, 1948. [466]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Petitioners Fred Elia Iob, Samuel M. Dobbs, and Waldemar F. Ullrich do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this case on December 31, 1948, in Judgment Book 55, page 42, denying relief under and dismissing their amended petition against Respondents Los Angeles Brewing Co., Inc., Joint Local Executive Board of California, Bottlers Local Union No. 896, Brewers, Maltsters & Yeast Workers Local Union No. 893 of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, Walter Eckberg, Anthony Zeigler, Thomas Vacca, and J. S. Allwine, and from all previous orders and decisions in this case adverse to such petitioners, including the interlocutory order denying injunctive relief, entered September 2, 1947, in Minute Book (Central Division) No. 60, page 312.

Dated this 28th day of January, 1949. [467]

JAMES M. CARTER,
U. S. Attorney,

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division.

JAMES C. R. McCALL,
Assistant U. S. Attorney,

/s/ JAMES C. R. McCALL,
Attorneys for Petitioners.

[Endorsed]: Filed Jan. 28, 1949. [468]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR
DOCKETING APPEAL

Upon application of the appellant-petitioners, Fred Elia Iob, Samuel M. Dobbs, and Waldemar F. Ullrich, under Rule 73-(g) F.R.C.P., it is ordered that the time for filing the record on appeal and docketing their appeal in the United States Court of appeals for the Ninth Circuit be extended to and including April 28, 1949. This 8th day of March, 1949.

/s/ PAUL J. McCORMICK,
Judge of the U. S. District
Court.

Presented by:

JAMES M. CARTER,
U. S. Attorney,

CLYDE C. DOWNING and
JAMES C. R. McCALL,
Assistant U. S. Attorneys,

/s/ JAMES C. R. McCALL,
Attorneys for Appellants.

[Endorsed]: Filed March 8, 1949. [469]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes the appellants, Fred Elia Iob, Samuel M. Dobbs and Walter Myer Ullrich and designate the entire record, proceedings and evidence as portions of the record on appeal, including but not limited to the following:

1. Clerk's Transcript of Record
2. Reporter's Transcript of Proceedings
3. All motions, affidavits and exhibits made or introduced in the case.
4. All the pleadings, findings, orders, opinions and judgment.

JAMES M. CARTER,
U. S. Attorney,

CLYDE C. DOWNING and
JAMES C. R. McCALL,
Assistant U. S. Attorneys,

By /s/ JAMES C. R. McCALL,
Attorneys for Petitioners.

AFFIDAVIT OF SERVICE BY MAIL

State of California,
County of Los Angeles—ss.

Helen Humes, being first duly sworn, deposes and says:

That (s)he is a citizen of the United States and a resident of Los Angeles County, California; that (her) business address is 600 Post Office and Court House, Los Angeles, California; that (s)he is over the age of eighteen years, and is not a party to the above-entitled action;

That on May 19, 1949 (s)he deposited in the United States Mails in the Post Office at 312 No. Spring Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Designation of Record on Appeal addressed to (1) P. H. McCarthy, Jr., Esq., Attorney at Law, 518 Balboa Bldg., San Francisco, Calif. and (2) O'Melveny & Myers, 433 South Spring Street, Los Angeles, Calif., Attention: William W. Alsup, his last known address, at which place there is a delivery service by United States Mails from said post office.

/s/ HELEN HUMES.

Subscribed and sworn to before me, this 19th day of May, 1949.

WM. P. WHITE,
Notary Public in and for said County and State.
[Endorsed]: Filed May 19, 1949. [471]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 471, inclusive, contain the original petition for Enforcement of Veterans' Reemployment Rights; Answer of Respondent Los Angeles Brewing Co. to Petitioners' Petition; Notice of Motion and Motion of Petitioners for New Trial with Leave to Add Parties; Amended Petition for Enforcement of Veterans' Reemployment Rights; Order to Show Cause; Interrogatories to Los Angeles Brewing Company, Inc., under Rule 33, F.R.C.P.; Motion to Dismiss, Vacate and Set Aside Alias Summons, Amended Petition for Enforcement of Veterans' Employment Rights, Order to Show Cause and Affidavits and Memorandum of Points and Authorities in Support of Motion; Motion to Dismiss; Affidavit of James M. McRoberts; Affidavits in Opposition to Order to Show Cause; Affidavit of Wm. H. Ahern in Opposition to Order to Show Cause; Answer of Additional Respondents the Joint Local Executive Board of California, et al., to Amended Petition; Stipulation and Order re Deposit in Court; Petitioners' Revised Points and Authorities for Final Action; Petitioners' Revised Points and Authorities for Final Action (Supplement No. 1); Reply to Petitioners' Revised Points and Authorities for Final Action; Additional Respondent's Preliminary Reply to Petitioners' Revised Points and Authorities for Final Action and

Supplement No. 1; Reply to Petitioners' Requests for Admissions of Additional Respondent; Reply of Los Angeles Brewing Co. to Petitioners' Requests for Admissions; Memorandum of Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Order Extending Time for Docketing Appeal and Designation of Record on Appeal and full, true and correct copies of Minute Orders Entered April 1 and 2, 1947, May 19, 1947, June 5 and 7, 1947, September 3, 1947 and December 23, 1948 which, together with original reporters' transcript of proceedings of April 1 and 2, 1947, June 5 and 7, 1947, September 3, 1947 and December 20 and 23, 1948 and original petitioners' exhibits 1, 2 and 3 and original respondents' exhibits A and B at the hearing of April 1 and 2, 1947 and original respondents' exhibits A to F, inclusive, at the hearing of June 5, 1947, transmitted herewith constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 27th day of May, A.D. 1949.

[Seal] By /s/ EDMUND L. SMITH,
Clerk. [472]

In the District Court of the United States for
the Southern District of California, Central
Division

No. 6322-M Civil

FRED ELIA IOB, et al.,

Petitioners,

vs.

LOS ANGELES BREWING COMPANY, INC.,
a corporation,

Respondent.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

Tuesday, April 1, 1947, 10:00 a.m.

Honorable Paul J. McCormick, Judge, presiding

Appearances:

For the Petitioners:

James M. Carter, Esq.,

U. S. Attorney, by:

James C. R. McCall, Jr., Esq.,

Assistant U. S. Attorney.

For the Respondent:

Hanna & Morton, by:

James M. McRoberts, Esq.,

1126 Pacific Mutual Building,

Los Angeles, California.

The Court: Call the case.

The Clerk: No. 6322-M, Civil, Fred Elia Iob, and others, vs. Los Angeles Brewing Company, Inc.

Mr. McCall: The petitioners are ready.

Mr. McRoberts: Ready for the defendant.

For the court's convenience, I understand that name is pronounced Iob.

Mr. McCall: Iob, yes, sir.

Mr. McRoberts: I understand that is right.

The Court: Proceed, gentlemen. I have read the pleadings and the memoranda.

Mr. McCall: Your Honor is ready to proceed with the case?

The Court: If you want to make any preliminary statement, you may do so.

Mr. McCall: Your Honor please, I do not know that I have any preliminary statement to make other than that set forth in the trial memorandum which was filed. We have agreed on the evidence, the documentary evidence, that will be adduced, and I am ready to present it to the court at this time—unless you want to make a statement?

Mr. McRoberts: No. We have agreed to and we have stipulated on that.

I think, so far as the defendant is concerned, your Honor, I will have to occupy the unique position of being a witness in this case, so that to save the court's time I would reserve my opening statement, because it would be in the nature of testimony, and I will give it at that time as a part of the record.

The Court: You are not going to argue the effect of your own testimony?

Mr. McRoberts: Well, I am going to be cast in a unique character, your Honor.

The Court: We would not pay much attention to a man arguing his own case.

Mr. McRoberts: How that comes about is because I have represented the Los Angeles Brewing Company since 1932, and matters which are pertinent here are known to no one else, you might say, than myself, in that I handled the actual negotiations. I am the only one who can testify first hand as to those various things.

The Court: You might have had one of your associates here.

Mr. McRoberts: If your Honor would grant me a continuance——

The Court: I think you would be in a better position if that were so.

Mr. McRoberts: That is why I anticipated that and made that statement at the outset.

The Court: If you are going to act as a witness, you could not with much force argue the effect of your own testimony. Naturally, I don't know what it will be.

Mr. McRoberts: I think, if your Honor is concerned on that point, that there will not be much question about what I would testify to and there would be no interpretation other than is in the documents. That, in effect, is practically all in the documents.

The Court: That is what I am talking about. If

there are no inferences or conflicts or differences of views to be explored by the court, then what I have said about a man arguing the effect of his own evidence is not applicable.

Mr. McRoberts: No, I don't think there would be, because the facts that I would testify to have been through the courts for 10 years, and there could not be any inferences drawn from my own evidence that would ensue in argument.

The Court: What do you say about that?

Mr. McCall: I don't know what Mr. McRoberts has in mind to testify to, because I don't think he has any testimony to give that would be contrary to what I am about to state, your Honor please.

There was a petition filed before the National Labor Relations Board last fall, in the latter part of the year, in which there was a decision rendered by the National Labor Relations Board last December.

Mr. McRoberts: That was just rendered—oh, for the election. That is right.

Mr. McCall: And in this opinion and order by the National Labor Relations Board, the course of events leading up to the conflict between these unions, in which the veterans were discharged last year, have been summarized. In other words, the force of the conflict involving these three parties, the Brewery Workers Union, the Teamsters Union, and the employer, is here summarized, and if it is agreeable to Mr. McRoberts—

Mr. McRoberts: Yes.

Mr. McCall: —we will stipulate that the facts found by the National Labor Relations Board in this opinion are correct.

Mr. McRoberts—I have. My testimony is purely historical, your Honor, which is not in conflict with any document in the case, but unfortunately my testimony has to be given because it happens I am the only one familiar with it.

The Court: I will have to ask you to raise your voice. I am afraid the reporter can't hear what you are stating.

I have indicated the views of the court with respect to a man arguing the effect of his own evidence; that it does not have much force.

Mr. McRoberts: I have no intention of arguing the effect of my own evidence, because my evidence is historical in nature. It is already in there, but I am going a little further and bringing it down to date. The facts are stipulated to.

The Court: If they are stipulated to, why don't you proceed with the stipulation?

Mr. McCall: Why can't we stipulate that the facts found in this National Labor Relations Board order are the historical facts which comprise the background of this dispute?

Mr. McRoberts: As far as it goes, yes.

Mr. McCall: Now, if there is any further background, of course, I don't know about it, and you would then be in the position of an ordinary witness. But I am willing to stipulate to what is in that, but as to the facts—if there are any other

facts, I would not be willing to stipulate to them.

Mr. McRoberts: I would not ask you to stipulate, but I would have to trace the history back of the Board's findings, which do not go back beyond 1943, and the background of the defendant's case goes back before 1939.

Mr. McCall: This goes back away to 1936. It traces it back there.

Mr. McRoberts: I didn't think it did.

The Court: I gathered from the memoranda that one of the crucial points in the case would be whether an asserted agreement or understanding or convention not in writing in any manner affected a subsequent closed shop agreement, which was in writing.

Mr. McCall: Yes, your Honor, that is the effect of it.

Mr. McRoberts: No, these facts do not go back as far as I would want to go. They go back to 1936 and contain a statement that we agreed on working rules in 1939, and we have the working rules adopted in 1939, and that was all I was going to testify to.

Mr. McCall: Then would you not stipulate that is what is in the decision?

Mr. McRoberts: With the working rules themselves. I have the working rules here.

The Court: Now, is there a stipulation or is there not a stipulation?

Mr. McRoberts: I think there is a stipulation.

The Court: What is it?

Mr. McCall: There is a stipulation, your Honor please, that the document now presented to the court, which is an order and decision and direction of election by the National Labor Relations Board, in the matter of Acme Brewing Company, No. 1786-D, being Cases Nos. 21-R-3564 and succeeding numbers, 21-R-3565, -3566, -3567, -3568, -3569, -3570, and -3697, before the National Labor Relations Board, contains a correct summary and statement of the steps in the conflict and the labor dispute between the Southern California Brewers, including the respondent, Los Angeles Brewing Company, and the International Brewery Workers Union, and the International Teamsters Union.

Mr. McRoberts: No, there was no labor dispute, Mr. McCall. This was not a labor dispute until December of last year. The facts we will stipulate to are the historical background that is contained in the Board's findings, which are correct.

Mr. McCall: Well, you object to the use of the words "labor dispute." Can we make it——

Mr. McRoberts: There was no dispute. Let's stipulate the facts found by the Board are the historical facts for this case.

Mr. McCall: That is all right.

The Court: So understood, and the document may be filed and marked as an exhibit.

The Clerk: Plaintiff's Exhibit 1.

(The document referred to was marked Plaintiff's Exhibit No. 1, and was received in evidence.)

Mr. McRoberts: You are offering the whole document?

Mr. McCall: The whole document.

The Court: What is the number, Mr. Clerk?

The Clerk: Plaintiff's Exhibit 1.

Mr. McCall: It is further agreed, your Honor, that the working rules referred to in Exhibit 1 are contained in the document which I now offer in evidence as Exhibit 2.

Mr. McRoberts: That those were the working rules in effect from 1939 until the signing of the contract attached to my answer.

Mr. McCall: All right.

Mr. McRoberts: As Exhibit A to my answer, the defendant's answer.

The Court: Is that correct?

Mr. McCall: Yes, sir.

The Court: That is the understanding between you, is it?

Mr. McRoberts: That is correct except as to the rates of pay, which varied. But outside of the rates of pay, that is correct.

The Clerk: Plaintiff's Exhibit 2.

(The document referred to was marked Plaintiff's Exhibit No. 2, and was received in evidence.)

Mr. McCall: It is next stipulated, and agreed, your Honor, that the document now offered as Exhibit 3 is an agreement between certain local unions of the International Brotherhood of Teamsters and

the International Brotherhood itself, made on the 25th day of July, 1946.

Mr. McRoberts: Yes.

The Court: That is the so-called closed shop written agreement?

Mr. McCall: Not yet, your Honor. This is an agreement under which the correlative Teamsters Unions were created by charter from the Teamsters.

Mr. McRoberts: Is that last statement of counsel a part of the stipulation?

The Court: Read that statement, Mrs. Zellner.
(The statement was read.)

The Court: Let me see if I understand what you mean. At the time of this so-called jurisdictional dispute between the unions, there was a severance of the make-up of the units in the different labor union organizations, and this instrument which has been described as Exhibit 3 purports to be the memorial of that situation. Is that what it is?

Mr. McRoberts: I could possibly describe it, counsel, if you would permit me to.

Mr. McCall: State it to the court.

Mr. McRoberts: If the Court please, the plaintiffs here were members of what was known as the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America. As found in Plaintiffs' Exhibit 1, the defendant, with other breweries throughout the United States, had had written contracts with this union, closed shop contracts, until 1936. This is in Plaintiff's Exhibit 1, as I say. From 1939 to 1946, by reason of a

jurisdictional dispute between the International Union of Brewery Workers and the Teamsters Union over drivers, the brewery operators in California refused to sign a contract, but recognized these working rules that are in evidence, which contain a closed shop provision.

In May of 1946, the International Union at its meeting in Cincinnati voted to affiliate with the Congress of Industrial Organizations. At that time the members in California refused to follow that dictum, and formed their own union, chartered by the Teamsters.

Mr. McCall: I object to that statement, your Honor.

Mr. McRoberts: That is in the statement of facts.

Mr. McCall: No. The fact is there were certain members of the International Brewery Workers Union in the State of California who seceded and secured charters for other unions, other local unions, from the Teamsters International Union, and this instrument, Exhibit 3, is the agreement whereby the Teamsters International Union issued charters to these seceding members of the International Brewery Workers Local Union.

Is that correct?

Mr. McRoberts: I think that is what I said, counsel, or meant to say.

Mr. McCall: You said the members in California did so and so. Certain members, or a portion of the members, withdrew and formed other unions.

Mr. McRoberts: Is there any question about the majority of the members forming these unions?

Mr. McCall: The majority? I am not arguing on the majority. Some seceded and quit the Brewery Workers Union and formed another union, and Exhibit 3 is the agreement under which the charters from the International Teamsters were issued to these members of the new local unions that were created at that time, in July of 1946.

The Court: These members constituted a unit to whom a charter was issued?

Mr. McCall: Yes, sir.

The Court: What is the point on the issuance of that charter, so far as the plaintiffs are concerned?

Mr. McCall: Your Honor please, they were separate, they were different labor unions. They were members of the Brewery Workers Union, to which they formerly belonged, and these men, as individuals, then went over and created themselves new unions on and after July 8, 1946, under another and different International Union. Then, on July 28, 1946, in their capacity as local unions of the Teamsters, they entered into the contract which is made Exhibit A to the defendant's answer in this case, which purports or claims to have created a closed shop agreement between the brewers and the new unions of the Teamsters, so formed.

The Court: Let me see if I understand you. We will describe them, for lack of a better term, as the local unions, the workers' union of the breweries

here, and this defendant company. When this dispute arose as to union control, the local unions, instead of confederating with the International which became a division or subordinate entity of the Congress of Industrial Organizations, the C.I.O., affiliated themselves with the other aggregated union organization, the American Federation of Labor. Is that it?

Mr. McCall: No, sir, they did not. The International Brewery Workers local unions still continued in existence, had officers and members, and went on a strike.

Mr. McRoberts: I object to that.

Mr. McCall: Well, that would be our position. At any rate, I will prove that, if there is any doubt about it.

The Court: Has the court stated what you will contend to be your position, Mr. McRoberts?

Mr. McRoberts: Yes, in substance, but so long as—yes, I think so, in substance. I will have to introduce some testimony now. I have some witnesses here.

The Court: All right. Then the point of difference between you now, that is apparent to the court, and it seems to be the only point of difference, is as to the result then that ensued when the local unions severed their connections with the International. Is that the only point of difference?

Mr. McCall: So far as the petitioners are concerned, there was never a severance.

The Court: The court will determine that. But I am asking you the question.

Mr. McRoberts: If your Honor please, if Mr. McCall is going into a question of jurisdiction, as he apparently is here, then I submit this court has no jurisdiction to determine that.

The Court: There is very serious doubt in the court's mind as to whether we could get into a labor question, even in these labor cases.

Mr. McRoberts: Judge James in a decision, as I recall, said——

The Court: Yes.

Mr. McRoberts: ——that we cannot go into jurisdiction. If counsel is going into that question, then I would have to make an appropriate motion.

The Court: Have you read that decision? That went to the Court of Appeals, as I remember.

Mr. McRoberts: Yes.

The Court: Do you have the citation.

Mr. McRoberts: It is in 106 Fed. (2d).

The Court: Was the District Court affirmed on that phase of it?

Mr. McRoberts: Yes, sir.

The Court: I didn't remember that. I remember the case.

Mr. McRoberts: It is 106 Fed. (2d) 876.

The Court: I don't believe we can try those labor disputes. I think the recent decision of the Supreme Court in the Lewis case is controlling on that.

Mr. McCall: I think the court has no jurisdiction to try whether there was an unfair labor practice, or anything of that sort, in this case, but I don't want the impression to be accepted as a fact that

the local unions of the International Brewery Workers did not continue under charters from that institution, and are not now in existence. Their membership is less, but they are in existence and functioning, and certain members, perhaps the majority, did form other unions subordinate to and under charters from the Teamsters Union. That is the fact, as I believe it.

Mr. McRoberts: That is pointing to jurisdiction. That is going to the question of jurisdiction.

Mr. McCall: Why should it go into jurisdiction? If it is a fact, then it is a fact. Isn't it a fact?

Mr. McRoberts: That what?

Mr. McCall: That that situation happened.

Mr. McRoberts: That the other unions continued?

Mr. McCall: Yes.

Mr. McRoberts: No. As a matter of fact, Mr. McCall, at the time you talk about, the Brewery Workers were an independent union, and they later affiliated with the C.I.O. But at the time you talk about, they were not affiliated with the C.I.O., they were not affiliated with the A.F. of L., but they were entirely independent, for your information.

The Court: You had better go on with your evidence. I want it clearly understood now that even in these veterans' cases I am not going to invalidate the Acts of Congress which preclude this court from trying any labor question.

Mr. McCall: That is right, and I have no intention to have your Honor to determine this to

be an unfair labor practice or a fair labor practice, but it is simply introduced in evidence to show there was in existence what was called and what was known as a labor dispute. Whether or not it was an unfair labor dispute is not in issue.

Mr. McRoberts: Then I object to it, your Honor. My understanding is the statement that the Joint Local Executive Board would only have a contract as the bona fide collective bargaining agency. That was my understanding, and it can't go into any question of jurisdiction.

The Court: How could we attempt, in view of the Norris-LaGuardia Act and the National Labor Relations Act and the Clayton Act, in a veterans case to invoke any equitable processes to reinstate a veteran, if there was a dispute concerning labor activities, and if that is the gist of the controversy concerning the veterans' rights to reinstate them, unless you have some authority to show that the federal courts have authority and that it has been held that in these veterans' cases, notwithstanding the very emphatic legislative pronouncements that have been adhered to by the [16] courts, particularly by the Supreme Court recently, and unless you can show we still have some right under the Selective Service and Training Act to inquire into those matters, we are not going to do it.

Mr. McCall: Yes, your Honor. This suit is predicated exclusively on the Selective Service and Training Act and the terms and conditions of employment which are required, and it is the position

of the veterans in this case that not only under the Selective Service and Training Act itself, but under the terms and conditions of their employment set forth in the contract, which was signed on July 28, 1946——

The Court: That is the exhibit attached to the answer?

Mr. McCall: Yes, sir, Exhibit A. (Continuing): ——that both under the law and under this contract, it is a part of the position held by these veterans that they should be restored and should not be discharged, and that is all.

The Court: You had better go ahead with your case.

The Clerk: Exhibit 3 in evidence.

(The document referred to was marked Plaintiffs' Exhibit No. 3, and was received in evidence.)

Mr. McCall: Mr. Iob, will you come forward, please?

FRED ELIA IOB

called as a witness by and on behalf of the petitioners, having been first duly sworn, was examined and testified as follows: [17]

Direct Examination

The Clerk: Your name is Fred Elia Iob?

The Witness: Yes, sir.

By Mr. McCall:

Q. Mr. Iob, what is your trade?

(Testimony of Fred Elia Iob.)

A. I am a brewer by trade, sir.

Q. How long have you followed that trade?

A. Since August, of 1936.

Q. Were you employed by the Los Angeles Brewing Company prior to your military service?

A. Yes, sir.

Q. When were you first employed by the Los Angeles Brewing Company?

A. On the 8th of March, 1943.

Q. Are you a member of the International Brewery Workers Union No. 7? A. Yes, sir.

Q. Were you at that time, in 1943?

A. Yes, sir.

Q. Now, did you continue in that employment until you entered the armed services?

A. Yes, sir.

Q. When did you enter the Army?

A. I went into the Army on March 9, 1945.

Q. And were you honorably discharged therefrom? [18] A. Yes, sir.

Q. On what day were you discharged?

A. July 20, 1946.

Q. Thereafter did you apply for re-employment by the Los Angeles Brewing Company?

A. Yes, sir.

Q. To whom, and when did you apply?

A. I applied for my job through a Mr. George Frank. He holds the position of assistant brewmaster at the Los Angeles Brewing Company.

Q. On what day was it?

(Testimony of Fred Elia Iob.)

A. On the 5th of September.

Q. On the 5th of September. Now, what conversation did you have with Mr. Frank? What did he tell you about coming back to work?

A. Well, he told me he would like to have me back, but that I would have to be cleared through the Teamsters Union; that I would have to see Mr. Schaffer.

Q. Mr. Schaffer of the Teamsters Local No. 893?

A. I believe so. I am not too familiar with their locals.

Q. Did you go to see Mr. Schaffer?

A. Yes, sir.

Q. On that day? A. Yes, sir. [19]

Q. What conversation did you have with Mr. Schaffer?

A. Well, he tried to persuade me to join the Teamsters Union, and I didn't accept his proposition. So, after a few exchanges of words, he said he would clear me in regard to my job, he would call the brewery, and I could go back to work, which I did do on the 9th of September.

Q. Do you know whether or not he called the brewery?

A. To the best of my knowledge, he probably did, because Mr. George Frank was aware—I mean he knew I would be back to work, that I had been cleared through Mr. Schaffer.

Q. Now, you then returned to work?

(Testimony of Fred Elia Iob.)

A. Yes, I did.

Q. For how long did you work?

A. I worked for eight consecutive days.

Q. Then what happened?

A. Then I was on the 15th of September to Mr. Jenichen. He is the representative, or used to be——

Mr. McRoberts: Just a minute. I object to hearsay testimony, your Honor. He can tell us what he did. He is referring now to a Mr. Jenichen.

Q. (By Mr. McCall): Did you have a talk with Mr. Jenichen? A. Yes, I did.

Mr. McRoberts: He doesn't work for the defendant.

Q. (By Mr. McCall): Does he work for the Los Angeles [20] Brewing Company?

A. No, he is—now, at the time I talked about, he was secretary of the Teamsters Union.

Q. All right. What happened with respect to your employment? Was it terminated on that day?

A. Yes, on the 17th of September.

Q. Well, never mind Mr. Jenichen then. Tell me what happened on the 17th of September.

A. On the 17th of September Mr. George Frank came to me and said he was sorry, but that he would have to let me go, due to the insistence of the Teamsters Union.

Q. And you didn't return to work any more?

A. That's right.

Q. Now, that was on the 17th of September, was it? A. Yes, sir.

(Testimony of Fred Elia Iob.)

Q. Did you see the Selective Service representatives about the matter at that time?

A. Yes, I did. I went to see Mr. Koenig.

Q. Who is Mr. Koenig?

A. He is the head of the Selective Service, in the Southern California branch here.

Mr. McRoberts: I object to any testimony, if your Honor please, as to any conversations with any representative of the Selective Service.

Mr. McCall: I have not asked for that. [21]

Mr. McRoberts: The facts are clear that this man was discharged. The company admits that. This is hearsay and irrelevant.

Mr. McCall: I am not asking for that conversation.

Mr. McRoberts: He brought in Mr. Koenig already, and I want to put my objection in before we go too far afield.

Mr. McCall: I have not asked for any conversation.

The Court: Let's get along.

Q. (By Mr. McCall): Did you thereafter go to work for the Los Angeles Brewing Company?

A. I was re-employed for the second time on the 6th of November.

Q. On the 6th of November? A. Yes, sir.

The Court: The question was if you went back to work.

The Witness: Yes, I did, sir.

The Court: On November 6th?

(Testimony of Fred Elia Iob.)

The Witness: Yes, sir.

Q. (By Mr. McCall): Whom did you see at the Los Angeles Brewing Company about returning to work? A. Mr. George Frank, again.

Q. Did you see him before you returned to work, before you were rehired?

A. Yes, I saw him two days previous to that, or a day previous to that. [22]

Q. What conversation did you have with him?

A. Well, it is pretty hard to explain, because there were so many people attending that conference that I had, along with Mr. George Frank, and the president of the Brewers, and the brewmaster, and two or three others that were in the office at the time.

Q. Was Mr. Koenig there?

A. No, he wasn't.

Q. Well, was any agreement reached at that time that you would return to work?

A. Yes, there was.

Q. Who was it reached with? What was said that showed you would go back to work?

A. Well, they agreed to hire me back again and they wouldn't discriminate against me, and I agreed to those terms, and I went back to work on the 6th of November.

Q. Had you in the meantime become a member of Local No. 893 of the Teamsters?

A. No, sir.

Q. How long did you work then?

(Testimony of Fred Elia Iob.)

A. Well, I worked until the 25th of November.

Q. What occurred at that time?

A. Well, I was offered a card to affiliate with the Teamsters Union, and I refused, and was discharged on the 25th of November. [23]

Q. Who discharged you, or who told you?

A. Mr. George Frank.

Q. Mr. Frank. What have you done since you were discharged the second time?

A. You mean in regard to my work?

Q. Yes, any earnings that you have made, or anything you have done.

A. I haven't worked for earnings since I have been discharged.

Q. Have you had any income at all from earnings or from work?

A. Well, I was receiving the Veterans Adjustment Compensation of \$20.00 a week, plus the strike benefit that we were receiving.

Q. Did you during this time maintain your membership in the International Brewery Workers Union, Local No. 7? A. Yes, sir.

Q. And you are still a member of it?

A. Yes, sir.

Q. And pay dues to it? A. Yes, sir.

Q. You have got a book from it?

A. Yes, sir.

Mr. McCall: That is all. [24]

(Testimony of Fred Elia Iob.)

Cross-Examination

By Mr. McRoberts:

Q. In what capacity were you employed originally at the brewery, Mr. Iob?

A. I was employed as a cooler man at the Los Angeles Brewing Company.

Q. That was in the brewing department, was it not? A. Yes.

Q. You are a brewer by trade? A. Yes, sir.

Q. And you were employed at the trade during the time you were employed at the defendant brewery; is that correct? A. Yes, sir.

Q. Now, when you first went to work in 1943, did you clear through a union? A. Yes, I did.

Q. What union did you clear through?

A. The International Brewers Union, Branch No. 4 of Local 7.

Q. Why did you clear through that union?

A. It was the customary thing to do.

Q. There was a closed shop arrangement over there, was there not?

Mr. McCall: I object. If there was a closed shop or not is a matter of law. [25]

Mr. McRoberts: He knows.

Mr. McCall: He was required to clear, and did clear.

The Court: Gentlemen, I do not want you to argue back and forth in this courtroom. I do not permit that. Make your objections and submit them, and I do not want to hear any argument at all. The objection is overruled.

(Testimony of Fred Elia Iob.)

Read the question, please.

(The question was read.)

The Witness: Yes, there was.

Q. (By Mr. McRoberts): And only fellow-members of your local brewery were employed in the brewing department?

A. Would you repeat that?

The Court: Read the question, please.

(The question was read.)

Q. (By Mr. McRoberts): Of your local union, I meant to say, were employed in the brewing department?

A. Well, not just fellow-members. They had a lot of permit card men there, too.

Q. Well, they were affiliated in some way with your organization, were they not, Mr. Iob?

A. Yes.

Q. When you returned from the service, that condition continued to exist; is that correct?

A. Well, on the—you are speaking of another union now, or—— [26]

Q. I am speaking of when you returned. When did you return from your service with the Army?

A. I was discharged on the 20th of July, and applied for my job on the 5th of September.

Q. When you went to work on the 5th of September, was there a closed shop effective—a closed shop arrangement effective in the brewing department? A. Oh, they claimed that, yes.

Q. Well, was there?

(Testimony of Fred Elia Iob.)

A. I have no way of proving it. I didn't see any contracts to that effect.

Q. Well, of what union were your fellow-employees members? Do you know?

A. Well, my fellow-employees were out on strike, and the others, I didn't belong to them. I didn't call them fellow-employees.

Q. Well, there were some employees in the brewing department, were there not, Mr. Iob?

A. Yes.

Q. Do you know of what union they were members or with what union they were affiliated?

A. I was told they were affiliated with the Teamsters Union.

Q. All of them?

A. The ones I talked to, yes. [27]

Q. Now, since the termination of your employment in November, have you attempted to procure employment of any kind? A. Yes, I have.

Q. Are you physically able to perform work?

A. Yes, I am.

Q. Why didn't you procure any employment?

A. Because there wasn't any available.

Q. Did you try with the U.S.E.S.?

A. Yes, I did.

Q. In what capacity did you attempt to procure employment?

A. Well, it had me classed as laborer; as a laborer.

Q. Were you offered a job as a laborer?

(Testimony of Fred Elia Iob.)

A. No, sir.

Q. Were any available for that?

A. None at the time.

Q. At any time from November to this date there have been no jobs available?

A. Well, I reported there regularly once a month. That is the customary rule that they have there, and I was never offered a job.

Q. At no time? A. At no time.

Q. In any capacity? [28]

A. In any capacity.

Q. By the U. S. Employment Service?

A. Well, they offered—I will take that back. Wait a minute. I will take that back. They wanted to send me back into the breweries, and after I explained the situation, it wasn't posted; I mean it wasn't insisted upon.

Q. Well, did they offer you jobs in the breweries, then?

A. Well, I couldn't very well take them after I had been discharged down there.

Q. But you were offered jobs in the breweries?

A. Once, yes.

Q. Were you offered any other jobs?

A. No, sir.

Q. Did you ask for any other jobs?

A. Ask for any other jobs? Yes.

Q. How have you supported yourself in the last six months, Mr. Iob?

A. Well, I think that is a personal matter, I believe, sir.

(Testimony of Fred Elia Iob.)

Q. I didn't hear the answer.

A. I say, I believe that is a personal matter, as to how I have supported myself.

Mr. McRoberts: Well, I ask for an answer to the question, your Honor. It is a question of mitigation.

The Court: Yes. You will have to answer. [29]

The Witness: Well, I received compensation from the Veterans Readjustment Administration at the rate of \$20.00 a week, which I am still drawing.

Q. (By Mr. McRoberts): Did you receive any strike benefits from Local 7? A. Yes, sir.

Q. How much did that amount to?

A. \$15.00.

Q. A week? A. Yes, sir.

Q. Are you employed at the present time?

A. No, sir.

Mr. McRoberts: I think that is all, your Honor.

Redirect Examination

By Mr. McCall:

Q. I will ask you whether or not you were required to go down to see Mr. Schaffer at the Teamsters Local 893 before you returned to work on November the 6th? A. No, sir.

Q. He was not present at that meeting where it was agreed you would go back to work?

A. Yes, he was. He was present.

Q. He was present? A. Yes, sir.

Q. Were representatives of the brewery there at that [30] time also, at this meeting?

(Testimony of Fred Elia Iob.)

A. You mean from the International Brewers?

Q. No, the Los Angeles Brewing Company.

A. Yes, Mr. Schaffer and a Mr. L. Hicke, who was acting shop steward at the time.

Q. I mean, was there any official of the Los Angeles Brewing Company at this meeting?

A. Mr. Lick was there. He is the general manager.

Q. Mr. Lick. He is the general manager of the whole company? A. Yes.

Q. Now, was anything said at that meeting about whether or not you, as a returned veteran, were entitled to work on your job notwithstanding the fact that you were not a member of the Teamsters Union?

Mr. McRoberts: I object to that, your Honor, as incompetent, irrelevant, and immaterial. The witness has testified he was re-employed.

The Court: Overruled.

The Witness: Would you repeat that?

The Court: Read the question, please.

(The question was read.)

The Witness: Well, there wasn't anything said about belonging to the union at the time. It was a question of whether I was capable of doing my work. [31]

Q. (By Mr. McCall): It had nothing to do, then, with your union membership?

A. That's right.

Mr. McCall: That is all.

(Testimony of Fred Elia Iob.)

Mr. McRoberts: No further questions.

The Court: This meeting was held on the second occasion when you went back, just before you went back to work?

A. Yes, sir.

Q. When you went back there the first time, was there anything said about union membership at all?

A. Well, Mr. George Frank brought up the question, that I would have to be cleared through the Teamsters Union before they could rehire me.

Q. Later on you went to work?

A. Yes, on the 9th of September I went back to work.

Q. How long after Mr. Schaffer told you—was that his name, Schaffer? A. Yes.

Q. How long after he told you that you would have to be cleared through the Teamsters Union was it?

A. I saw Mr. Schaffer on the 5th, and I went back to work on the 9th.

Mr. McCall: Your Honor, Mr. Frank is the man at the brewery, and Mr. Schaffer is the business agent at the union. [32]

The Court: You stayed there until what time in September?

A. Until the 17th of September.

Q. How did you happen to quit on that day?

A. I didn't quit, your Honor. I was discharged.

Q. What happened?

A. Well, then they brought up the question that

(Testimony of Fred Elia Iob.)

I wasn't affiliated with the Teamsters Union; that they had cause to discharge me.

Q. When you went back in the first instance, did you say you were going to join the Teamsters Union? A. No, sir.

Q. You cleared with the Teamsters Union?

A. Well, the only thing I can figure out is that they tried to make an effort to have me affiliate with the Teamsters Union, and after this talk with Mr. Schaffer and I refused to join, then he cleared me anyway. He cleared me through the company anyway, because I wouldn't affiliate with them under any conditions.

Q. The men with whom you had affiliated were out on strike, I believe you said, at that time?

A. Yes, sir.

Q. Did you go through the line to work?

A. Well, the first time I came on was until the 17th, and there wasn't a picket line formed there until the 23rd of [33] September.

Q. There was no picket line there between the 9th and the 17th?

A. The first time the picket line was in evidence was on the 23rd of September.

Q. The first time it was in evidence—you mean that was the first time you saw it?

A. That was the first time it existed, your Honor.

Q. There was no picket line there when you went to work in the first instance after coming out of the service? A. That's right.

(Testimony of Fred Elia Iob.)

Q. But you knew that your associates in your union were out on strike?

A. At other breweries, yes, sir.

Q. Weren't they out on strike?

A. What I mean to say is, they were picketing at other breweries at that time.

Q. Weren't they on strike?

A. They were, but they hadn't formed a picket line there up until the 23rd of September.

Q. Were any of the other members of the union working there with you at that time?

A. Yes, your Honor.

Q. You testified as to this meeting when these different persons were present, when you went to work the second [34] time, and I believe you used the term that they agreed to put you to work without discrimination. What did you mean by that?

A. Well, this Mr. Schaffer was there, and he took the floor and promised they would treat me as fair as any other member of their union, that they wouldn't discriminate against me in any way.

Q. You say "they." What do you mean by "they"?

A. I used the word "they" because he used the same word; the membership that was working at the brewery at the same time.

Q. You are referring to the workers instead of the brewery manager?

A. This Mr. Lick, the general manager, also agreed to that effect, that they would treat me fair

(Testimony of Fred Elia Iob.)

and not just find any old excuse to discharge me again; that as long as I was able to do my work there wouldn't be any question as to my rights to work there.

Mr. McCall: If your Honor please, may I ask a question there?

The Court: Yes.

Mr. McCall: The Mr. Schaffer you are talking about is the business agent of the Teamsters Local 893 of the Brewers Union with whom you cleared for the job?

The Witness: Yes, sir. [35]

Mr. McCall: He was there, and he is the one that said you would not be discriminated against?

The Witness: Yes, sir.

The Court: You also said the man that represented the brewery company was present?

A. Mr. Lick, yes.

Q. And he also said you would not be discriminated against? A. That's right.

Q. That is the one you testified said you would not be discriminated against?

A. Well, before this meeting was over they all more or less agreed, that is, they all agreed I would be treated in a fair manner; that is, they wouldn't hold anything against me so long as I didn't belong to the Teamsters Union.

Q. Then, later on, your final separation from the work came when someone told you you would have to join this Teamsters Union, or else; is that it? A. That's right, your Honor.

(Testimony of Fred Elia Iob.)

Q. And you didn't want to join the union and left the work there; is that it?

A. I didn't leave the work. I was discharged again.

Q. How did that happen?

A. On a Monday—on that Monday in the morning the shop steward offered me a card to sign so that I could [36] affiliate with the Teamsters Union, and I refused to sign that card, and in the afternoon I was discharged. I was fired again.

Q. How did the discharge come up? What happened?

A. By Mr. George Frank. He seemed to have that capacity of hiring and firing. He fired me for the second time.

Q. What did he say?

A. He said he regretted to see me go, that my work was very satisfactory, and that the Teamsters insisted that I be discharged.

The Court: That is all.

Mr. McCall: That is all, your Honor.

(Witness excused.)

Mr. McCall: May it please your Honor: It is stipulated and agreed that the petitioner Iob was discharged by the Los Angeles Brewing Company on September 17th, pursuant to the following letter received from the Brewers, Maltsters and Yeast Workers of California Local No. 893, signed by Elmer Schaffer, secretary, dated September 16th, and addressed to the attention of Mr. Charles Lick:

“Gentlemen:

“This is to notify you that Messrs. Fred Iob and Bruno Reichelt, presently employed in your Brewing Dept., are not in good standing of Brewers Local Union No. 893, affiliated with the International Brotherhood of [37] Teamsters.

“Under the terms of the agreement signed by your firm with the Joint Local Executive Board of California, of which the above-mentioned union is a component part, only members in good standing of said Local Union may perform the work in the Brewing Department, as set forth in Section I-A of said agreement.

“We therefor request that you immediately comply with the provisions of said agreement by the discharge of these two above-mentioned persons employed in said departments of your firm.

“Very truly yours,

“Brewers, Maltsters and Yeast Workers Local Union 893.

“Elmer Schaffer, Secretary.”

You don't want that introduced, do you?

Mr. McRoberts: No. You have read it in evidence.

Mr. McCall: It is also agreed, your Honor, that his discharge on November 26, 1946, was made on the basis of the following letter, dated November 25, 1946, written by Elmer Schaffer, secretary of Local

Union 893 branch of the Brewers, Maltsters and Yeast Workers of California, Local Union No. 893, addressed to the Los Angeles Brewing Company, attention of Mr. Charles Lick:

“Gentlemen: [38]

“We request the immediate discharge of Fred Iob. He has no permit from Local Union 893 to work, nor is he a member of Local Union 893. Therefore, we ask his immediate discharge.

“Yours truly,

“Elmer Schaffer,

“Secretary, Local Union 893, Br. 4.”

I will call Mr. Ullrich.

WALTER F. ULLRICH,

called as a witness by and on behalf of the petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Walter F. Ullrich, U-l-l-r-i-c-h.

The Clerk: Walter F. Ullrich?

The Witness: Yes, U-l-l-r-i-c-h.

By Mr. McCall:

Q. Mr. Ullrich, what is your trade or occupation?
A. Brewery bottler.

Q. How long have you followed that work?

A. Ever since 1934.

(Testimony of Walter F. Ullrich.)

Q. When were you first employed by the Los Angeles Brewing Company?

A. In February, 1937. [39]

Q. Did you continue in their employ as a bottler from 1937—was it January?

A. February.

Q. —from February, 1937, until you entered the Army? A. Yes, sir.

Q. When did you enter the Army?

A. May 9th, in '42.

Q. How long did you remain in the Army?

A. Until February 8th, in 1946.

Q. Were you honorably discharged?

A. Yes, sir.

Q. Did you then apply for re-employment at the brewery? A. Yes, sir.

Q. When did you apply?

A. April 29, 1946.

Q. April 29th. Were you employed immediately?

A. Yes. Well, in April, on the 29th—

Q. You returned to work?

A. Well, I had to apply first. Then I returned—yes, that was April 29th. That was on Monday. That's right.

Q. Then you went back to work. Now, let me ask you, does the brewery maintain a seniority list of its bottlers?

A. Yes, sir. They did at the time.

Mr. McRoberts: I object to that as incompetent, irrevelant, and immaterial, your Honor. [40]

(Testimony of Walter F. Ullrich.)

The Court: I didn't gather from the pleadings that it is a question of seniority.

Mr. McCall: Well, we ask that he be returned without loss of seniority.

The Court: You didn't allege that specifically. It is only as to the demand of the serviceman for re-employment under the Act?

Mr. McCall: Yes.

The Court: You didn't say anything about the loss of seniority. Are you making a claim that this witness lost his seniority?

Mr. McCall: Oh, yes, sir. He was discharged.

The Court: Other than the discharge, I am talking about. Apparently you and I do not understand the term the same way. "Seniority" and "work" are two different things.

Mr. McCall: Yes, sir.

The Court: One is employment, and the other is status at work.

Are you claiming here not only that he was wrongfully discharged and that he was not properly reinstated, but, also, that he was not given the status to which he was entitled?

Mr. McCall: No, sir, I do not contend that on his re-employment he was not, no, sir.

The Court: All right.

Mr. McCall: But I wanted to call the court's attention [41] to the seniority list maintained at the brewery and his place on it.

The Court: The schedule of wages is set up.

(Testimony of Walter F. Ullrich.)

I think you have both agreed on the wage that these three petitioners were entitled to, under the agreements with the brewery. There does not seem to be any difference there, so far as the computation is concerned.

Mr. McCall: No, sir. Your Honor please, what I am referring to is a list of employees in given classifications, according to their hiring date, their seniority date, and which is maintained in the union shops, is open to inspection, and an employee is put on that list and then removed when he is discharged, and he loses his seniority. I want to show by him that such a list is maintained and was maintained there, and that he was on that list as of his original hiring date. That regulates, your Honor, the laying off and other rights.

The Court: Suppose he was not on the list and worked for the brewery and came back and wanted his job. What difference would it make whether there was hung up in the brewery a list?

Mr. McCall: I don't know that there would be any, your Honor.

The Court: I don't know what you are driving at. We are taking up time, I think, on nonessentials.

Mr. McCall: All right, sir. I will eliminate the question. [42]

Q. (By Mr. McCall): How long did you continue in the employ of the Los Angeles Brewing Company after you were re-employed?

(Testimony of Walter F. Ullrich.)

A. Until September the 21st, which was my last day.

The Court: April 29th to September 21st?

The Witness: Yes, sir.

Q. (By Mr. McCall): Now, what occurred after that time? I will state it this way: Did you return to the Los Angeles Brewing Company's plant on October 23rd for the purpose of going back to work?

A. Yes, sir.

Q. Was that a Monday?

A. That was on Monday.

Q. But you did not go back to work?

A. No, sir.

Q. Why?

A. There was a picket line around the plant.

Q. Was that the first time that the picket line had been there? A. Yes, sir.

Q. Did you enter the plant and see Mr. Hoff on the following Wednesday?

A. Yes, we talked to Mr. John Hoff.

Q. Who is Mr. Hoff?

A. He is the bottling house superintendent. [43]

Q. Is he in charge of the bottlers?

A. Yes, sir.

Q. Now, what conversation did you have with Mr. Hoff at that time about your back pay and any termination slip?

Mr. McRoberts: To which I object, if the Court please. It was testified that he left the brewery's employment because he would not go through a

(Testimony of Walter F. Ullrich.)

picket line. Under the Act the brewery is then under no further obligation.

The Court: I wouldn't be so sure of that. I don't see what the back pay has to do with the situation. Any conversation that occurred about his work is material. We are not going to get into a labor dispute in this case because we have no right to get into that.

Q. (By Mr. McCall): Did you have a conversation with Mr. Hoff at that time as to whether or not you were then in the employ of the company? A. Yes, sir.

Q. Now, what was said by Mr. Hoff at that time about that?

A. Well, Mr. John Hoff, he told us that we weren't discharged, we were still on the pay roll, and that our jobs were still there.

Q. What was the occasion for him making that statement?

A. Well, there was five older men didn't have a statement on their pay checks that they were discharged, so that [44] they could go down and sign up for the unemployment insurance.

Q. Did they have such a statement as that required?

A. They had to have a discharge statement, that they were discharged, or were fired, or something like that.

Q. And Mr. Hoff's statement was made in regard to that inquiry by you employees?

A. Yes, sir.

(Testimony of Walter F. Ullrich.)

Q. The men in there with you, were they men who had been out on strike?

A. Yes. We didn't go out. We did refuse to cross the picket line, these seven fellows that went in to see Mr. Hoff.

Q. You were not on the picket line?

A. Yes.

Q. You were or were not?

A. I was not on the picket line. I refused to go through the picket line.

Q. How long did you stay around there on October 23rd?

A. I went right back home after.

Q. And this conversation you had with Mr. Hoff was on the regular pay day, Wednesday, October 23rd?

A. Yes, sir.

Mr. McRoberts: Counsel, may I ask, was it September 23rd or October 23rd.

Mr. McCall: September.

Mr. McRoberts: Yes. You said "October." [45]

The Court: It was September?

The Witness: Yes, September 25th.

The Court: 25th?

The Witness: It was on pay day, yes, sir. The picket line was on the 23rd.

The Court: We have got the strike, and the picket line was placed there on the 23rd, but the conversation was on pay day, September 25th?

The Witness: Yes, sir.

The Court: And the picket line was still in existence on that date?

(Testimony of Walter F. Ullrich.)

The Witness: Yes, sir.

Q. (By Mr. McCall): Now, did you thereafter have a talk with Mr. Hoff about returning to work, active work?

A. Yes, sir; the following Monday. That was September 30th.

Q. What time was it?

A. Well, it was around 10:00 o'clock, or close to that.

Q. Who was present?

A. Well, there was Glen Busick, Harry Fisher, Fritz Huessler, Orville Parker, George Jones, Youl Homan, and myself.

Q. Did you speak for the group?

A. Well, we all spoke there, more or less.

Q. All right. What was said by Mr. Hoff about you men returning to work? [46]

A. He said our jobs were there and we could go back to work. So we told him we would be in the following morning, ready to go to work. So he told us that first we would have to go down to see Mr. Ziegler and get a clearance from the union.

Q. Who is Mr. Ziegler?

A. He is the secretary of the Teamsters Union.

Q. The secretary of which one of the Teamsters Unions? Teamsters Union 896, or is that the Bottlers Union?

A. The Bottlers Union, Local 896.

Q. Now, Mr. Hoff's words were that you would have to go down to see him on what?

(Testimony of Walter F. Ullrich.)

A. Yes, and get a clearance first.

Q. Get a clearance for what?

A. So we could come back to work.

Q. Did you go down to see Mr. Ziegler?

A. Yes, we did.

Q. On what date?

A. The same day, right after the conversation with Mr. John Hoff.

Q. Where did you go to see him?

A. Why?

Q. Where?

A. Down at the Labor Temple.

Q. I will ask you if you were a member of the Brewery [47] Workers Union 293.

A. Yes, sir.

Q. You were at that time? A. Yes, sir.

Q. Now, did you see Mr. Ziegler over at the Teamsters?

A. Yes, sir; we saw Mr. Ziegler over there.

Q. What was said about your returning to work?

A. Well, he asked us what he could do for us. So one of the men that was in our group, he got up and said we wanted to return back to work.

Q. Who was that?

A. That was Fritz Huessler.

Q. And what did Mr. Ziegler say?

A. He told us that we were all through over at Eastside, the Los Angeles Brewing Company, and that our jobs had been replaced. So I told him that Mr. Hoff just told us half an hour or an hour

(Testimony of Walter F. Ullrich.)

ago that our jobs were there, that we could go to work.

Q. What did he say to that?

A. Well, I don't think the lady would write it down.

Q. Well, did he say that you might join the Teamsters Union?

A. He said we could sign up and he might find something here or there for us.

Q. Was he referring to finding something for you to do [48] at the Eastside Brewery?

A. No, not at the Eastside. He said that was out.

Q. That was out. What did you do after this conversation with Mr. Ziegler?

A. Well, we all went home then. Then the next day I went up to see Mr. Koenig.

Q. Thereafter did you return to the Los Angeles Brewing Company plant and again offer to go to work?

A. Yes, through Mr. Koenig's advice, Samuel Dobbs and myself and Selden Johnson saw Mr. John Hoff on October 5th, on Saturday, and reported to go to work.

Q. What time was that?

A. That was around 1:00 o'clock in the afternoon.

Q. What did Mr. Hoff say at that time about your coming to work?

A. Well, he said that as far as he was concerned

(Testimony of Walter F. Ullrich.)

our jobs were still there, but that he orders not to put us back.

Q. Now, did he make any call?

A. Yes, he made a phone call, and I don't know just who he called.

(Testimony of Walter F. Ullrich.)

Mr. McRoberts: I object to any further testimony as to a telephone call, your Honor. We have gone rather far afield, and it is hearsay.

Mr. McCall: I haven't asked him for that conversation. [49]

Q. (By Mr. McCall): Did he say that you could or could not return to work?

A. He said as far as he was concerned our jobs were still there.

Q. Yes, but what?

A. But that he was more or less with his hands tied, and he couldn't do anything unless he got the O.K., I guess from the union, the Teamsters Union.

Q. Well, he said you couldn't work, anyway. Did he tell you you could or not?

A. That we couldn't go to work.

Q. Now, you didn't go back to work there any more?

A. No, sir.

Q. The last day you worked, then, was October 21st?

A. No, September 21st.

Q. September 21st. And the date that Mr. Hoff last told you that you couldn't work there was October 5th; is that it?

A. Yes, sir.

Q. All right. Is Local Union No. 293, the International Brewery Workers, still in existence?

(Testimony of Walter F. Ullrich.)

A. Yes, sir.

Q. Do you pay dues to it?

A. Well, not—you pay dues when you work a 40-hour week. If you don't work 40 hours, then you don't pay any dues [50] for that month.

(Testimony of Walter F. Ullrich.)

Q. But you have a book? A. Yes, sir.

Q. And paid dues all the way up to when?

A. Right up to date. I am a good member, in good standing in that local.

Q. When was the last time you paid dues?

A. Well, September.

Q. September of 1946? A. Yes, sir.

The Court: Was that on checkoff? Is that the way the dues were paid?

Mr. McRoberts: No, your Honor. We have no checkoff.

The Court: The dues are paid by you yourself, personally?

The Witness: Yes, sir.

Mr. McCall: To whom did you pay them?

The Court: You understand what I mean? You pay the dues personally?

The Witness: Yes, sir.

The Court: The employer, the brewery company, did not deduct the dues?

The Witness: No, sir. I paid them personally.

The Court: That is the same union or the same unit—let us use that term—that you belonged to before you went into service? [51]

The Witness: Yes, sir.

(Testimony of Walter F. Ullrich.)

Mr. McCall: I believe that is all.

Cross-Examination

By Mr. McRoberts:

Q. Mr. Ullrich, were you ever discharged by the Los Angeles Brewing after you returned from service? A. No, sir.

Mr. McRoberts: That is all.

Mr. McCall: I object to that, your Honor, as a conclusion.

The Court: What do you mean, you were never discharged? Why didn't you continue to work there?

The Witness: Well, when we came to work on Monday, the 3rd of September, they had that picket line around there, and I didn't know anything about it, so I respected the picket line. And I didn't want any trouble, so I went home that day, and inquired about the picket line, and after I found out that it was in sympathy with the fellows that had been discharged previous to that, and that it was more or less a peaceful picket line, I went back and asked for my job back.

The Court: And you got it back?

The Witness: No, sir.

The Court: You didn't get it at all?

The Witness: Pardon?

The Court: You didn't get the job at all? [52]

The Witness: No, sir.

The Court: And you were told you would have to see some man in the Teamsters Union?

The Witness: Yes, sir.

(Testimony of Walter F. Ullrich.)

The Court: In other words, as I understand, or, who was this man that represented the brewery that you talked to there? Mr. Koenig?

The Witness: Koenig?

The Court: Who was the man you talked to when you came back after not having gone through the picket line?

The Witness: Oh, Mr. John Hoff, the bottling house superintendent over at the brewery.

The Court: What did he say to you about it?

The Witness: He said our jobs were there and we could go to work; they were open to us.

The Court: Why didn't you immediately commence work?

The Witness: Well, because first we had to go down and get a clearance from the Teamsters Union.

The Court: Who told you that?

The Witness: Mr. Hoff.

The Court: So that the brewery, through its representative, told you that before you could go to work you had to get a clearance from a certain union?

The Witness: Yes, sir.

The Court: That was not the union of which you were a [53] member?

The Witness: No, sir.

The Court: And was not the unit that you had been affiliated with before you went into the service?

The Witness: No, sir.

The Court: That is all.

Mr. McRoberts: May I ask one more question?

The Court: Yes.

(Testimony of Walter F. Ullrich.)

Q. (By Mr. McRoberts): Mr. Ullrich, have you been employed since September 23rd?

A. No, sir.

Q. Have you tried to get employment?

A. Yes, I have tried all over.

Q. Have you had any income during that period from any source?

A. I can't hear you very plain.

Q. What have you lived on since September 21st to date? Have you been paid, too, by the union?

A. With all the money I saved together, and with what the union paid me, I have existed.

Q. How much did the union pay you?

A. \$25.00.

Q. \$25.00 a week? A. That's right.

Q. You got more money than Mr. Iob did? [54]

A. Well, he drew the other.

Q. Did you draw any other unemployment insurance, or anything like that? A. No.

Mr. McRoberts: That is all.

Redirect Examination

By Mr. McCall:

Q. How do you account for the difference between the \$15.00 that Mr. Iob got and the \$25.00 you got?

A. Well, if we had got unemployment insurance of \$20.00 a week, the union paid \$15.00. If you didn't get that, then the union paid the individual member \$25.00.

Q. And you couldn't get your unemployment in-

(Testimony of Walter F. Ullrich.)

insurance because you could not get a clearance slip or dismissal slip from the union?

A. Something like that.

The Court: From the union?

The Witness: No, a discharge from the brewery.

The Court: Let's get that straight, because that is an important feature. In order to qualify for unemployment insurance you had to have some memorial or certificate or writing, or some evidence that your employer had no work for you, and that you were out of work; is that right?

The Witness: Yes, sir.

The Court: Did you ask the brewery for such a certificate? [55]

The Witness: Well, when we went up to the Unemployment, we had to fill out these different applications, and then they, in turn, would call the plant about each individual case.

The Court: Did they call the brewery in your case?

The Witness: Well, I think they did.

The Court: You just assumed that they did?

The Witness: Yes.

The Court: You didn't take it up, yourself?

The Witness: Because I never drew it.

The Court: When you were told by the representative of the brewery that your job was open to you, but that in order to fill it you would have to see this representative of the Teamsters Union and get a clearance——

The Witness: Yes.

(Testimony of Walter F. Ullrich.)

The Court: ———what did you say to him?

The Witness: Well, I told Mr. Hoff that we would return to work the following day. That would have been on a Tuesday.

The Court: Yes.

The Witness: And the only thing that stopped us was that Mr. Ziegler from the Teamsters Union, he wouldn't give us a clearance.

The Court: That is all.

Mr. McCall: That is all.

(Witness excused.) [56]

Mr. McRoberts: I am willing to stipulate that Mr. Dobbs' testimony will be the same as this witness'.

Mr. McCall: Well, I don't want to stipulate as to dates.

The Court: The dates are set up in the pleadings.

Mr. McCall: All right. It is stipulated that Mr. Dobbs will testify the same thing as Mr. Ullrich.

Mr. McRoberts: Yes.

Mr. McCall: Mr. Cowdrey, will you take the stand?

GEORGE E. COWDREY

called as a witness by and on behalf of the petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

(Testimony of George E. Cowdrey.)

The Witness: George E. Cowdrey.

The Clerk: How do you spell the last name?

The Witness: C-o-w-d-r-e-y.

By Mr. McCall:

Q. Mr. Cowdrey, what is your occupation?

A. Formerly bottling shop superintendent at Stewart McKee.

Q. That is Stewart McKee Brewing Company?

A. Brewing Company.

Q. How long were you there?

A. About five years. [57]

Q. Are you at present connected with Stewart McKee? A. No.

Q. Are you a member of the International Brewery Workers Union? A. Yes, sir.

Q. Which one?

A. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America.

Q. Which local? A. 293, Branch 3.

Q. How long have you been a member of that?

A. Since 1935.

Q. Is that local union still in existence?

A. Yes, sir.

Q. Did any of its officers leave that local in May or June of 1946? A. Yes, sir.

Q. And organize a Teamster Union?

A. Yes, sir.

Q. Thereafter, did the local of which you speak continue in existence? A. Yes, sir.

Q. And elect officers? A. Yes, sir.

(Testimony of George E. Cowdrey.)

Q. Now, what is your present connection with the [58] International Brewery Workers?

A. International representative.

Q. Are you familiar with the affairs of the locals in Southern California? A. Fairly well.

Q. Was there a strike called at the Los Angeles Brewing Company in September, 1946?

A. Yes, sir.

Q. Was a vote taken at the local unions to establish a picket line?

A. It was agreed that if these discharges continued that they would picket the place.

Q. What discharges do you mean? What was the picketing for?

A. Firing such men as Iob and John Giovanazzi, old-timers.

Q. That was at the Los Angeles Brewing Company? A. Yes, sir.

Q. In other words, the picket line followed the discharge of Iob, among others?

A. Yes, I would say that.

Mr. McCall: I believe that is all.

Mr. McRoberts: No questions.

(Witness excused.)

Mr. McCall: This is our last remaining witness, your [59] Honor. Will you take the stand, Mr. Koenig?

V. H. KOENIG

called as a witness by and on behalf of the petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: V. H. Koenig, K-o-e-n-i-g.

By Mr. McCall:

Q. Mr. Koenig, what is your position?

A. Veterans' Assistance Officer for Southern California for the Selective Service System.

Q. I believe that you, in that capacity, looked into the re-employment cases of the petitioners in this case.

A. Yes, sir.

Q. Did you have contact with Mr. Lick of the Los Angeles Brewing Company in regard to this matter?

A. I did.

Q. In whose behalf did you first see and talk to Mr. Lick? Which one?

A. The first meeting I had with him involved only one case, and that was the Iob case.

Q. Do you know on what date it was you saw him and talked to him?

A. I have my file there; if I could look at it, I could [60] tell you the date.

The Court: You may get the file.

(The witness referred to a file.)

The Witness: October 2, 1946.

Q. (By Mr. McCall): Where did this meeting take place?

(Testimony of V. H. Koenig.)

A. In his offices in the Los Angeles Brewery Building on North Main Street.

Q. About what time of day?

A. During business hours. I wouldn't remember. It was between 9:00 and 4:00 of the day.

Q. Now, did you discuss with Mr. Lick, or did he say anything in regard to whether or not returned veterans were entitled to work at the brewery regardless of union membership?

Mr. McRoberts: To which I object, your Honor, as incompetent, irrelevant, and immaterial.

The Court: Overruled.

The Witness: I did have a conversation with him at that time.

Q. (By Mr. McCall): On that subject?

A. Upon that subject, among others, a lot of other things. But that was one of the subjects of discussion.

Q. Now, state to the court how that subject came up, and what was said about it.

A. I was brought down to Mr. Lick's office by another man, named Doub. [61]

Q. From the brewery?

A. From the Los Angeles Brewery, yes. I think he was personnel manager, or the head of that department. And Mr. Lick, as I understand, was vice-president and general manager of the Los Angeles Brewing Company.

A. I told him I had a series of complaints that had been filed by veterans, and one of them in-

(Testimony of V. H. Koenig.)

volved his place there. He stated to me that they had been very careful not to violate any veteran's rights; that they had no—that there were no cases of veterans with veterans' rights who had not been employed, or as to whom employment was not recognized. So I told him that I was certain there was, that this man claimed to be an employee, and gave him the name of Fred Iob. So he telephoned to someone in the plant to procure the personnel records of this Fred Iob. We sat down and waited for compliance with that phone call, and he told me—Mr. Lick stated that he knew that they were liable to the veterans for a year's employment and that he was certain that there must be some error because they had checked to make certain that the veterans were not put out or laid off.

In answer to his phone call, either someone came in or phoned him, I don't remember that, but, anyway, the records could not be found of Fred Iob, and on that particular subject that was all that was said at that time.

Q. I see. This conversation occurred on what date, [62] again? A. October 2, 1946.

Q. Was that about the date, also, that you had a conversation with Ullrich and Dobbs?

A. No, that was subsequent.

Q. Subsequent to that time? A. Yes.

Mr. McCall: That is all.

Mr. McRoberts: No questions. [63]

Mr. McRoberts: If your Honor please, I want to make the motion we discussed earlier, to dismiss the complaint, as it is based on the question of having the court take jurisdiction to determine a labor dispute. It is not an out and out matter of a provision of the Selective Service and Training Act, but, on the contrary, is an attempt to declare the contract signed by the defendant with the Joint Local Executive Board of California, Exhibit "A" to its answer, is not a bona fide contract, and a corollary to that raises the presumption that the Joint Local Executive Board is not a labor union within the purview of the Wagner Act. On those two grounds, and on the authority of the so-called James case, 106 Fed. (2d) 871, [79] we believe that this petition should be dismissed.

The Court: The motion will be denied without prejudice. I think it is a very close question. It illustrates the dire consequences of certain of this labor legislation in the last 15 years, and it may be that the effect of it is to impinge upon a veteran's rights to the extent that the relief which he should be accorded in these cases cannot be accorded. But I am not clear on that yet. I want to read these decisions which have been cited. So I will deny the motion at this time without prejudice.

Mr. McRoberts: I will call Mr. Ziegler.

ROBERT ZIEGLER

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Robert Ziegler.

The Clerk: How do you spell the last name?

The Witness: Z-i-e-g-l-e-r.

By Mr. McRoberts:

Q. Will you state your business or occupation, Mr. Ziegler?

A. My position is co-ordinator of the veterans' program for the American Federation of Labor.

Q. And your offices are where? [80]

A. My office is at 306 West Third Street, and located within the Veterans' Service Center.

Q. Were you occupying that position or discharging those duties as a co-ordinator from last September to the present time?

A. I have been co-ordinator for the American Federation of Labor officially for three years and two or three months.

Q. Would you describe to the court just what your duties as a co-ordinator are, of what they consist?

A. My duties are, of course, primarily to establish policies and procedures in behalf of the veterans under the jurisdiction of the American Federation of Labor. Such policies were to include waiving or reducing of initiation fees, and the assistance

(Testimony of Robert Ziegler.)

that could be given in any of the employment problems of veterans. My duties also were to counsel veterans and place them according to their aptitudes or talents or abilities which they seemed to possess, and my work has been on a national scale from here, and I have done it really principally to introduce such procedures.

Secondly, as co-ordinator, I was also required, and, as a matter of fact, it evolved out of the general work, to be mediator, to be a friendly adviser to courts, and I have been in that capacity before practically all of the courts in this town, in assisting veterans to obtain their just rights or relief, or in obtaining probations if they were found guilty. [81]

My work included also to assist in bringing about an understanding between veterans and their employers, between veterans and union executives, with their business agents or other officials, or shop foremen, and to fight for the best interests of the veterans.

At the same time, of course, my duties are clearly defined, that they should always remain within the limitations of agreements or policies and procedures, as they have been established over a period of many years.

Q. Are you acquainted with Mr. Fred Iob, who sits in the courtroom? A. I am, sir.

Q. Did you meet Mr. Iob in the discharge of the duties you have mentioned here?

(Testimony of Robert Ziegler.)

A. I did. And if it pleases the Court, I should like to state that I was asked by a group of young men that were in disagreement with the local unions over whom I have jurisdiction, by virtue of my position. Four or five young men came to my office, and they came for my assistance and stating their differences.

Q. Did that include Mr. Iob?

A. Mr. Iob, and which was as a direct result of my assuming this responsibility.

Q. Now, did you have a conference at the Los Angeles Brewing, at which Mr. Iob, Mr. Elmer Schaffer, and various [82] other persons were present, sometime in the fall of 1946?

A. I did, sir.

Q. Would you state to the court just the conversation that was had at that time?

A. Well, I reminded Mr. Iob and the other parties present, that, as co-ordinator in the veterans' program of the American Federation of Labor, I had issued a directive as a result of my investigations, and these investigations included talking to the strikers, talking to the employers, talking to the various union executives, and examining the records, and I had determined that the strike was illegal; and I had requested all the various unions, and also the employers, to enable the veterans to go back to work and forget the past, forget the attitude, even the fact that they had been striking or picketing. And I reminded Mr. Iob of that fact.

(Testimony of Robert Ziegler.)

I had invited through this directive all the striking—the handful of striking men, and among them some veterans, that they were invited to join the union, all the four unions having jurisdiction; that the roster would be open for them, and that the past be forgotten. And in some cases I believe some of the boys——

Mr. McCall: If the Court please, I object to the testimony of the witness as being immaterial.

Mr. McRoberts: Just a minute.

The Court: I think you had better interrogate the [83] witness.

Mr. McRoberts: Very well, your Honor.

Q. (By Mr. McRoberts): Also, at its conference at the Los Angeles Brewing, did Mr. Iob indicate he wished to join the Teamsters Union, or did he refuse to join?

A. Well, he refused to join, in spite of my request to do so and my advising him.

Mr. McCall: I object to that as not responsive.

Q. (By Mr. McRoberts): Now, at that time did you have a talk with any representative of the brewery with respect to the employment or the continued employment of Mr. Iob?

A. I did, sir.

Q. And with whom did you have that conversation?

A. Well, I had the conversation with, I believe, Mr. Schaffer and with——

Q. I mean an officer of the brewery, Doctor. Did you ever talk with Mr. Lick in this time?

(Testimony of Robert Ziegler.)

A. Oh, with Mr. Lick personally. The conference was held in his office.

Q. Now, did you have a conference in Mr. Lick's office, at which time Mr. Schaffer and Mr. Iob, to name but a few, were present?

A. Yes, indeed.

Q. Now, at that time did Mr. Lick make any statement to you with respect to the defendant's attitude toward Mr. Iob's [84] continued employment?

A. Well, the attitude was, or, rather——

Mr. McCall: I object. He asked if he made a statement.

Q. (By Mr. McRoberts): Just state, if you can recall, Doctor, what Mr. Lick said, if anything, bearing upon Mr. Iob's continued employment.

A. Well, Mr. Lick stated, so far as I can recall, that the boy had been placed back to work, even in preferred employment, and he had been able to make a large amount of money; if I recall, some \$110.00——

Mr. McCall: Your Honor, I object to that.

The Witness: ——or \$120.00 in the first week.

Mr. McCall: If your Honor please, I object to that.

The Witness: Your Honor——

The Court: Wait a minute.

The Witness: I also object.

The Court: Wait a minute. Now, just conduct yourself as a witness here, please.

(Testimony of Robert Ziegler.)

The Witness: I am sorry.

Mr. McCall: The question, your Honor please, was whether or not Mr. Lick had made a statement about the continuance in employment of Mr. Iob, and what the witness is testifying to now is something else.

Mr. McRoberts: That may go out, Mr. McCall.

The Court: Just confine yourself to the questions, Mr. [85] Witness.

Q. (By Mr. McRoberts): Doctor, I am just trying to find out if there was any statement made by Mr. Lick with respect to Mr. Iob's continued employment, which I understand had been interrupted at that time by the demand of the Teamsters Union.

A. Well, Mr. Lick made two statements, so far as I can recall. One, that he would be willing to re-employ him, but also indicating that his work had not been satisfactory because he had evidenced a very belligerent attitude.

Q. Now, did you have a subsequent conversation with Mr. Iob and any representative of the brewery concerning his employment?

A. I must confess this goes back several months, and I have had many such conferences with the men involved, including Mr. Iob, in which I suggested returning to work and accepting the democratic verdict of the——

Mr. McCall: I object, your Honor. The answer is not responsive.

(Testimony of Robert Ziegler.)

Mr. McRoberts: It is responsive insofar as the suggestion that Mr. Iob return to work, and I am willing to concede that the rest is not——

The Court: Is overly responsive.

Mr. McRoberts: Is overly responsive, that is right.

Q. (By Mr. McRoberts): Doctor, Mr. Iob returned to his [86] duties sometime in October, did he not? He was first terminated in September, and then restored sometime later in September or early in October? Is that your recollection?

A. I believe so, yes.

Q. And then his services were again terminated; is that your recollection? A. Yes.

Q. Now, at the time of his second termination, did you have a conversation with Mr. Lick, in which Mr. Lick and Mr. Iob were present, as you recall?

A. Well, I do recall a conversation relative to the dismissal of Mr. Iob on the grounds that his employment was contingent upon him joining the union, as a condition of employment.

Q. Now, who told you that, Doctor?

A. That was told me both by Mr. Lick and by an attorney of the defendant.

Q. You mean myself?

A. Yourself and another attorney, whom I happened to meet in San Francisco.

Q. I see. Now, was there anything else said concerning Mr. Iob's employment, after this second termination of employment? In other words, Doc-

(Testimony of Robert Ziegler.)

tor, to review your testimony, if I may, you stated you were advised at this second meeting that Mr. Iob's employment was being terminated by reason of [87] the union's demand, and that was the sum and substance of any statement made by Mr. Lick or by any officer of the corporation; is that correct?

A. That is correct.

Mr. McRoberts: That is all. Thank you, Doctor. Cross-examine.

Mr. McCall: That is all.

ELMER SCHAFFER

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Elmer Schaffer.

By Mr. McRoberts:

Q. What is your business or occupation, Mr. Schaffer? A. I am a brewer.

Q. Do you have any other occupation?

A. I am the secretary of Local 893, Branch 4, of the American Federation of Labor Brewers, affiliated with the Teamsters Union.

Q. How long have you been a brewer?

A. 36 years.

Q. How long have you been employed by the Los Angeles [88] Brewing Company?

(Testimony of Elmer Schaffer.)

A. Going on 11 years.

Q. Now, were you ever a member of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, Local No. 7?

A. I was.

Q. For how many years?

A. Well, of Local 7 I was for 10 years, and then in Local 10 the rest of the 26 years.

Q. Local 10? A. Of Baltimore, Maryland.

Q. Local 10 was the predecessor of Local 7?

A. Yes.

Q. Did you have any official capacity in Local 10 or Local 7?

A. I held an official capacity in Local 7 from 1938 to 1941, as their secretary of Branch 4.

Q. Do you hold a position—I believe you testified you are secretary of your present local?

A. I am, yes, sir.

Q. All right. Now, prior to July 28, 1946, you were then employed in the brew house of the Los Angeles Brewing Company?

A. I was employed in the brewing department of the Los Angeles Brewing Company. [89]

Q. To your knowledge, did the Los Angeles Brewing Company recognize any closed shop arrangement concerning employees in its brewing department? A. Prior to——

Mr. McCall: If your Honor please, I am going to object. The word “closed shop” is used, and I would like to know what is meant by that term, and

(Testimony of Elmer Schaffer.)

what the witness is talking about when he uses the term. I object to the question because it calls for a conclusion of the witness, and ought to be more definite.

Mr. McRoberts: All right. We will do that.

Q. (By Mr. McRoberts): Prior to July 28, 1946, Mr. Schaffer, were all employees of the brewing department of the Los Angeles Brewing Company members in good standing of Local Union No. 7, Branch 4, of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America?

A. Is that prior to July 28, 1946?

Q. That is right. A. They were.

Q. And from what source did the brewery procure its employees in the brewing department?

A. Through the union.

Q. And all of their employees?

A. All of their employees.

Q. Now, on July 28th you became a member of the Joint [90] Local Executive Board of California?

A. I did.

Q. And you became an officer about that time?

A. An officer, yes, sir.

Q. After that date to what union did the members, the employees in the brewing department of the defendant brewery, belong?

A. After July 28th?

Q. Yes, that is right.

A. Well, the majority of the members voted to

(Testimony of Elmer Schaffer.)

join the A. F. of L. Brewery Workers, affiliated with the Teamsters Union, because prior to that they had voted, defeating by nine to one affiliating with the C.I.O. in the State of California.

Q. Now, is your organization affiliated with the Joint Local Executive Board of California?

A. It is.

Q. And that Joint Local Executive Board are labor unions? A. They are labor unions.

Q. And they carry on collective bargaining negotiations with various companies?

A. They do.

Q. To your knowledge, are there any members or employees in the brewing department of the defendant brewery who are not members of your local? [91]

A. There is not one of them. They all belong to the union.

Mr. McCall: You mean at the present time?

Mr. McRoberts: I said "now."

Q. By Mr. McRoberts: Is employment handled through your office?

A. It is handled through my office; must be cleared through my office.

Q. And you furnish the brewery company with such employees as it needs in its brewing department? A. I do.

Q. Are you acquainted with Mr. Fred Iob?

A. I am.

Q. Directing your attention to sometime in Sep-

(Testimony of Elmer Schaffer.)

tember of 1946, did you have a conversation with him with respect to his continuing in the employment of the defendant brewery? A. I did.

Q. Who was present at that conversation, and where did it take place?

A. Well, Mr. Iob came down to my office in the Labor Temple and asked me if he could go back to work. I stated that he could. Then I explained to him that our setup was not the same as it had been before, when he left to go into the services; that during this conference in Cincinnati in May, that they had put out a referendum vote, and, of course, California voted nine to one not to accept the joining in the C.I.O., and that we had affiliated ourselves with the Teamsters Union.

Mr. McCall: This answer is not responsive, your Honor.

Mr. McRoberts: It is relating a conversation which he had.

The Court: That is what I understood. You are telling what you told him?

The Witness: Yes.

The Court: You may continue.

The Witness: And I explained to him, to the best of my knowledge, that although the majority of the men had gone that way, that I am not refusing him any work. I neither used coercion nor any persuasion. I only explained to him, as a gentleman should, that that was the setup, and that I believed he could sign over with us and everything be O.K.

(Testimony of Elmer Schaffer.)

Q. By Mr. McRoberts: Did he, in effect, accept your offer?

A. No, he did not. He would not sign over to the Teamsters.

Q. Now, did you after that serve a written notice upon the defendant to discharge Mr. Iob by reason of his lack of union affiliation?

A. Well, now, I don't want to get ahead of my story.

Q. Just answer. Did you do that? [93]

A. Yes, sir.

Mr. McRoberts: If your Honor please, I hate to break the continuity. These were read into evidence. They do not have an exhibit number, but I think that as to the letters he refers to it can be stipulated they were the ones read into the record.

Mr. McCall: Yes, I think so.

The Court: Do you want to offer them in the record here physically?

Mr. McCall: No, I don't care about that.

Q. By Mr. McRoberts: You did advise the defendant then in writing to discharge Mr. Iob for the reasons you have stated? A. I did.

Q. Did you at that time threaten the defendant with any economic reprisals in the event they refused to follow your notice? A. I did not.

Q. Did you at any time threaten the brewery with a strike or economic boycott, if they continued to keep Mr. Iob on? A. I did.

Q. Now, after the first letter was received and

(Testimony of Elmer Schaffer.)

the first termination, did you after that clear Mr. Iob for re-employment? [94]

A. I was ordered so by the Selective Board.

Q. Just answer the question. You did that?

A. Yes.

Q. Now, would you state to the court under what circumstances you cleared Mr. Iob for re-employment?

A. That was through an order of the Selective Board, under the Selective Act, that is.

Q. Who signed that order?

A. Well, I don't know. I never seen the order.

Q. Someone told you that the order existed?

A. That's it.

Q. Do you know what party told you that?

A. I don't recall the party's name just right now, because it has been such a confusing thing, and I have just slipped up and forgotten his name.

Q. Now, after you heard of this purported order or believed in its existence, did you then contact Mr. Iob and tell him to report to the brewery for work?

A. Well, he was notified through this Selective Board to come to the Los Angeles Brewing Company and see me about his job.

Q. All right. Did he see you?

A. Yes, he did.

Q. Did you have a conversation with him at that time?

A. Well, all I understand was that he was to go back to [95] work, and I told him that there would

(Testimony of Elmer Schaffer.)

be no molestation of him, everybody would treat him fine, to forget the past, and he should go along and do his duty as asked of him.

Q. All right. Now, then, after that you served another written notice upon the brewery to again terminate his service? A. Yes, I did.

Q. What changed your mind on that?

A. Well, I happened to be called into a conference in San Francisco, and our attorney up there found out that I had put Brother, Mr. Iob, back to work, and he wanted to know why, and I told him there was an order of the Selective Service Board. Well, he says, "Nothing doing, but," he says, "I want you to do this. I would like for you to talk to Mr. Iob and ask him if he would think it over and come on and affiliate with us, and if he don't, why, naturally, there was only one thing I could do;" that is, to order me to have him discharged.

Q. All right. Did you follow out these instructions and contact Mr. Iob?

A. I personally—I followed out the orders, but personally I didn't contact him, but left it up to the shop steward and another witness to go to Mr. Iob.

Q. Well, you yourself did not do it?

A. No, I did not.

Q. Then, after that, were you advised that Mr. Iob had not joined your organization? [96]

A. I was.

Q. Did you at that time serve a second letter upon the defendant? A. I did.

(Testimony of Elmer Schaffer.)

Q. To terminate his employment? A. Yes.

Q. And was it at that time that you threatened strikes or economic reprisals if your demands were not met? A. I did.

Q. Were you present at the office of the defendant corporation at any time when there was a conference between yourself, Dr. Ziegler, and Mr. Iob, to name a few? A. I was.

Q. Was Mr. Lick, of the Los Angeles Brewing Company, there at that time?

A. Mr. Lick was there.

Q. Did Mr. Lick make a statement to you with reference to his attitude toward Mr. Iob?

A. Not so far as I can recall.

Mr. McRoberts: That is all. Cross-examine.

Cross-Examination

By Mr. McCall:

Q. Mr. Schaffer, you say that for 10 years you were a member of Local 7, up to July, 1946?

A. I was. [97]

Q. And at that time did you sever your membership there and join the Teamsters Union?

A. Not in those 10 years, up until July.

Q. I mean, at what time did you acquire membership in the Teamsters Local No. 893?

A. July 29th.

Q. That is on the day following the signing of this contract?

A. No, that—I will take it back. It was the 28th.

Q. The 28th. On the same day, then. In other

(Testimony of Elmer Schaffer.)

words, you joined the Teamsters Local 893 and entered into this contract, working contract, on the same day; is that correct?

A. No, I have to take that back. I made a misstatement there. I was in that there—I can't recall the date. It wasn't the 28th, because the contracts were signed after we affiliated ourselves with the Teamsters Union.

Mr. McCall: Could I see Exhibit 3, please?

(The document was handed to counsel.)

Q. By Mr. McCall: Are you acquainted with the negotiations by which Teamsters Local 893 came into existence?

Mr. McRoberts: To which I object, your Honor. We are again getting into the realm of the jurisdiction of the Labor Board, or the jurisdiction of labor unions.

The Court: We seem to be into that pretty well in this case. [98]

Mr. McRoberts: Yes, we seem to be.

The Court: We will go into it only as far as necessary. Overruled.

Q. By Mr. McCall: Are you acquainted with the negotiations that took place which led to the formation of Teamsters Local 893?

A. No, I am not.

Q. Were you active in taking any part in the organization of this local on or about July the 25th?

A. I was then appointed as secretary.

(Testimony of Elmer Schaffer.)

Q. That was about the day, then, that Teamsters Local 893 was formed; is that right?

A. That I could not swear to.

The Court: Was that last year?

Mr. McCall: In 1946, yes, your Honor.

Q. By Mr. McCall: Do you know the date when that local was formed? I believe you stated, though, that you joined it on July 28th, or a couple of days before that time.

A. The majority of the membership of our organization signed their pledge cards to affiliate themselves with the Teamsters, and that was around about 90 per cent.

Q. Never mind the per cent. What date was it?

A. That was on, if I recall, on the 25th of July.

Q. The 25th of July, of 19— A. '46. [99]

Q. 1946. Now, at that time there was no Teamsters Local, was there, in existence?

A. Well, that I can't answer either.

Q. Well, you were secretary of that organization.

A. I was made secretary after the 25th.

Q. You have a charter that was issued to that local, have you not?

A. I haven't the charter myself, no.

Q. Is there a charter in existence?

A. Well, that would be up in San Francisco.

Q. In other words, you are simply a branch?

A. Just a branch.

Q. Of this local which covers the California brewers; is that right? A. That's right.

(Testimony of Elmer Schaffer.)

Q. But you don't know of the existence of that union at any time before that time?

Mr. McRoberts: If your Honor please, I object to this line of questioning on the ground it is not relevant to any issue before this court, the date of the existence of this union.

Mr. McCall: With that question I will be through.

Mr. McRoberts: All right.

Q. By Mr. McCall: Mr. Schaffer, were you a member of Joint Local Executive Board of California of the Teamsters [100] Union, which entered into this contract of July 28th with the California State Brewers?

A. We were part members; that is, members of that brother local and the Joint Board up in San Francisco.

Q. Were you at that meeting?

A. I was not at that meeting.

Q. Were you a member of this so-called Joint Local Executive Board of California?

A. I am only the secretary of Branch 4, Local 893.

Q. I got the impression a moment ago that you stated you were a member of this Local—Joint Local Executive Board.

A. I didn't state the Joint Board.

Q. Who was the representative of Local 893 on this Joint Local Executive Board?

A. Well, he is the secretary. That had been always the secretary, even up to Local 7.

(Testimony of Elmer Schaffer.)

Mr. McRoberts: Is counsel questioning whether the Joint Local Executive Board is a labor union? What is this line of questioning designed to reach? I object to it as not within the issues.

Mr. McCall: I wanted to get this contract established as having been signed by somebody, and who they were, and perhaps we can stipulate, and then we have some questions. It seems that the contract, which is Exhibit "A" to your [101] answer, purports to have been signed for employees and by James G. Hamilton, of the California State Brewers Institute, for Institute members in Southern California, and it does not name the Los Angeles Brewing Company.

Mr. McRoberts: That is a misprint. I can remedy that, if the Court please. We were a party to it and signed it. The pleadings so show.

The Court: The pleadings show that the defendant Brewing Company was a member of the Institute?

Mr. McCall: It does not.

Mr. McRoberts: Your Honor, we pleaded the contract. We are not a member of the Institute, but the original contract—and, if necessary, I can produce it—was signed by the Institute and by myself on behalf of the defendant, and in the pleadings that last part was unintentionally omitted.

The Court: I see.

Q. By Mr. McCall: Now, Mr. Schaffer, getting back to the discharge—by the way, you were acquainted with Mr. Iob prior to July 28th, were you?

(Testimony of Elmer Schaffer.)

A. Yes, sir.

Q. You knew him before he went into service and afterwards? A. Yes, sir.

Q. Now, you did then, insofar as you are concerned, issue to him a working permit or give him oral leave to work [102] when he returned on September the 9th; is that correct? A. Yes.

Q. And you didn't raise any objection to him going to work? You knew at that time that he was not a member of the Teamsters and didn't intend to become a member, didn't you?

A. Well, as I stated, I was ordered by the Selective Board to put the man back to work.

Q. No, I mean before that time. I am talking about when he first came back, the very first day that he worked, September the 9th, 1946. He came and talked to you before he went to work, didn't he?

A. He did.

Q. And it was agreeable with you that he return to his job?

A. Well, I told him to go ahead and go back to work, and that maybe we could iron this thing out.

Q. I see. Now, what caused you within a week thereafter, to change your mind, that the man should be fired?

A. Because when I stated to him that we would iron this thing out later, I asked him if he would become a member or affiliate himself with our union, and he flatly stated he would not.

Q. Did you have any written working rules to

(Testimony of Elmer Schaffer.)

issue the permit, or did you just permit the man to work?

A. No, we don't use any writing in sending a man to [103] work. A man that is a union man knows his duties, and knows what he is to do, and, therefore, he does his duties as asked of him.

Q. I take it, then, the reference in this contract to the use of working permits does not constitute any written instruments, but is just the oral consent of the union representative?

A. Just what do you mean by "permits"?

May I ask that question, your Honor?

The Court: Yes.

Q. By Mr. McCall: Referring to Section 2 of this contract, the section reads as follows:

"All employees shall be obtained and hired through the respective locals and branches thereof to which the employees in said department are required to belong; provided, however, that should said respective locals be unable to provide satisfactory employees, then and in that event, said employees may be obtained from any source; and provided, further, however, that said employees so obtained through other sources shall be required to apply for a permit card from the respective locals to which the employees in said department belong."

A. Well, but Mr. Iob was not a permit-card man. He was a book man, and permit-card men are only

(Testimony of Elmer Schaffer.)

hired when the season is heavy and we need extra men to pull through the [104] heavy work.

Q. That is a man that doesn't have a book and is not a book man?

A. He is under the rules and the jurisdiction of the union when he accepts the permit card, the same as the book man.

Q. But the book men are the actual members?

A. Yes, sir, the book men are the actual members.

Q. And the permit men are not?

A. They are members so far as their permit allows them. They pay their dues, the same as the regular book men, and are under the jurisdiction of the union.

Q. But you don't consider them members?

A. We consider them members as far as it goes, according to their paying of their dues. We protect them, the same as we do our members. They may not be bona fide members, but we protect them the same as our members.

Q. You would call them, then, a quasi-member?

A. No, they would be permit men.

Mr. McRoberts: May I interpose an objection? I want to apologize for unduly interrupting, but I think we are now trying to prove the validity of a labor union, which we cannot do here. Whether a man was a book man or a permit-card man is immaterial to the issues of this case, as I see it.

The Court: Not entirely. Section 2 seems to pro-

(Testimony of Elmer Schaffer.)

vide [105] for what is commonly called, for lack of a better definition, a closed shop. It does provide, however, that if, as, and when union workers are not available, that workers may be received from other sources, but then it goes into another ambiguity and says, "provided further, however," that that source must be obtained from men who have permits, and in order to get that permit they have to go to the union representative.

Mr. McRoberts: That is right.

The Court: So, while the contract is ambiguous, it apparently is to some extent contradictory. The general purport of it is that it constitutes a closed-shop agreement. I think that is one of the features of the case that calls for very careful consideration, as to whether or not we are not trying a labor case instead of a veterans' case. We are vitally interested in these veterans' cases, but this looks more like a labor case, and if it is a labor case, we have no authority to try it.

Mr. McCall: Yes, I agree with you, your Honor.

The Court: I think you will agree with that.

Mr. McCall: Yes, sir.

Q. By Mr. McCall: Now, you are familiar with Section 4 (b) of the contract, are you not?

A. Well, offhand I am not, no.

Q. Well, that is the section which provides, in substantially the terms of the re-employment provisions of the Selective Training and Service Act, that veterans who have left, honorably discharged

(Testimony of Elhner Schaffer.)

veterans of the armed forces who have left jobs in the employ of brewers, shall, upon application, be re-employed in their former jobs and not be discharged therefrom without cause for one year. You knew about that section?

A. I knew about that section, yes, sir.

Q. Now, your contract was entered into in 1946. I will ask you if it was not your opinion and the opinion of Mr. Lick that the veterans referred to in this provision were those who were returning from the war.

Mr. McRoberts: I object to the witness' opinion, if your Honor please.

The Court: I think we will take judicial knowledge of that fact.

Mr. McCall: Yes, sir.

The Court: The manner in which the statement is clothed in the agreement throws some light on it. In other words, the phrase there is quite a descriptive statement. This reads:

“In the case of any employee inducted into the land and naval forces of the United States of America for training and service under the Selective Training and Service Act of 1940, if such person shall have left [107] his position, other than a temporary position, in order to perform such training and service, and shall have received the certificate prescribed by said Act, and if he is still qualified to perform the duties of such position and makes application

(Testimony of Elmer Schaffer.)

for employment within sixty (60) days after he is relieved from such training and service, the employer shall restore such person to such position or to a position of like seniority, status and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so."

Now, the problem here is whether or not it has been made impossible, by reason of these disputes between labor organizations, for the employer to do what the Selective Training and Service Act says he shall do.

Mr. McCall: Well, I wanted to get the construction that was placed on this particular section by you, your Honor, is the reason I was asking about it. You have this section—

The Court: I think it is clear from his evidence. I do not want to foreclose your examination, but it seems to me it is clear from his evidence so far that before those who had the right to say whom the defendant company shall employ in the brewery, or permit a worker to engage in work in the brewery, that the worker must conform to certain union regulations. Isn't that the purport of the agreement, and isn't [108] that what his evidence shows here?

Mr. McCall: I am trying to show—

The Court: Isn't that the contention that the petitioners make here? In other words, that there is here an economic pressure or a social pressure,

(Testimony of Elmer Schaffer.)

I don't care how you characterize it, but the pressure is this, that the veteran, in order to go to the Brewing Company and go to work, has to go to the representative of the labor union organization and get his approval. So that the Brewing Company, even though it desired to employ him, and even though he desired to work there, could not do so without creating this disturbance. That puts an economic and a social pressure on the veteran, doesn't it?

Mr. McCall: Yes, sir.

The Court: Then how are you going to obviate that, except by commanding the Brewing Company to do something by equitable process which we can't do under law?

Mr. McCall: Well, that is exactly what I think should be done, your Honor.

The Court: Yes, I think a lot of these things should be done, but we have these laws that prevent us from doing it. The federal courts can't issue these injunctions in labor cases. We can't say to an employer, "Here is a veteran who had a job with you before he went into the service, he is back and wants his job back," because the employer is [109] confronted with a collective bargaining agreement that he has made with a union, which says that under no circumstances will he employ anyone excepting with the approval of the union.

Mr. McCall: If your Honor please, that is not what this contract says. I want to be heard on that in argument.

(Testimony of Elmer Schaffer.)

The Court: I am going to hear you, yes, but you read it over and analyze it, and you will find that is exactly what it says, and that is what the evidence shows was done.

Mr. McCall: What I want to ask this witness about now, your Honor, is the fact he interpreted this clause as entitling the veteran to work without union membership.

Q. By Mr. McCall: You didn't require union membership of him when you cleared him for work the first time, did you? A. I did.

Q. You did? A. I did.

Q. Did he promise he was going to join?

A. He said, no, he wasn't going to join.

Q. But you permitted him to work?

A. Under that order of the Selective Service Board.

Q. Even before that didn't you permit him to do so? A. No, I didn't.

Q. I understood you had.

A. No, I didn't permit him to do it until he would— [110] I said, "You think this over."

Q. I see.

A. And I said, "And in that case, if you decide that you want to join up with us, you can go back to work." And he absolutely refused.

Now, I am not in a position to say exactly what day that was, because there has been so much on my mind in this confusion of all these seven or eight months, that it is a pretty hard question to get

(Testimony of Elmer Schaffer.)

everything right, too, but I will do the best I can to tell the truth.

Q. What caused you to change your mind within that week? He worked a week, and you ordered him to be fired.

A. Because he refused to join the union when he was asked to, and because we didn't want the dual organizations working, and we didn't care to have him agitate around the rest of the working men. We had to protect our own interests.

Q. It was for the purpose of protecting your Teamsters Union that you asked him to join?

A. It was to prevent any agitation going on during working hours in this shop.

Q. I see. After he was discharged, you changed your mind again and agreed that he should go to work, didn't you?

A. That was—I didn't put him back to work on my own accord.

Q. He came to see you, didn't he? [111]

A. He did not come to see me.

Q. Before he went to work the second time?

A. No, sir.

Q. Mr. Schaffer, don't you recall that he came to see you and had a personal conversation with you, in which you said that you had made a mistake in causing him to be fired, that he had a right to work anyway?

A. No, sir, I did not make such a statement.

Q. After he did go back to work, you knew he had gone back to work?

(Testimony of Elmer Schaffer.)

A. I told you, through the Selective Service order.

Q. No such order was given to you, was it?

A. No, it wasn't. I took his word for it. In fact, I talked to Mr. Ziegler. Mr. Ziegler told me if there was such an order, I should carry it out.

Q. Who told you that there was such an order?

A. I can't recall the name, just who told me that. I wish I could recall the name.

Q. Do you know Mr. Tony Ziegler?

A. I know Mr. Tony Ziegler, yes.

Q. Mr. Tony Ziegler is the secretary of the Bottlers Union of the Teamsters, isn't he?

A. Yes, sir.

Q. Which Mr. Ziegler are you talking about?

A. I am talking about Mr. Robert Ziegler. [112]

Q. The gentleman who was just on the stand?

A. Yes, sir.

Q. Then you changed your mind the third time and decided to fire him. What caused you to make that change?

A. I did not change my mind the third time. I was called to San Francisco on a conference, and I stated to our attorney up there that through the Selective Service Board we had to put Iob back to work, and he wanted to know why. And I told him there was an order. He said, "When you go back to San Francisco"—I mean "to Los Angeles, you have your shop steward with a witness go to Iob and ask him in a nice way if he is willing, to keep

(Testimony of Elmer Schaffer.)

his job, to sign over with us, and if he refuses, you send a letter for discharge." And I only followed out my instructions.

Mr. McCall: That is all.

Mr. McRoberts: Mr. Clerk, do you have Plaintiffs' Exhibit 2 there?

(The document was handed to counsel.)

Redirect Examination

By Mr. McRoberts:

Q. You are familiar with the so-called working rules that were in effect in the Brewers from 1936 to 1946? A. Yes, sir.

Q. Referring to Section 1 (a), which reads as follows:

"Only members in good standing who are members of [113] Local Union No. 7 of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America shall be employed as brewers in the brewing department, malting department, and syrup plants, including all basements, platforms, and wash houses used in connection with the operating of the brewing department, malting department, and syrup plants, and each of them."

I will ask you if that paragraph was performed by the defendant and observed by it at all times.

A. It was.

Q. And all employment was done and carried out pursuant to that? A. It was.

(Testimony of Elmer Schaffer.)

Mr. McRoberts: That is all.

Mr. McCall: That is all.

(Witness excused.)

Mr. McRoberts: Mr. Tony Ziegler.

ANTON J. ZIEGLER

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Anton J. Ziegler.

By Mr. McRoberts:

Q. What is your business or occupation, Mr. Ziegler? [114]

A. Secretary of Local Union 896, Branches 3 and 4, Los Angeles.

Q. Of what is that a labor organization?

A. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers.

Q. Does your organization represent a majority of the employees in the bottling department of the defendant brewery? A. Yes, sir.

Q. And has it so represented a majority of such employees since July 28th of last year?

A. That's right.

Q. Now, prior to the date I have last mentioned, were you an officer of Local Union 293,

(Testimony of Anton J. Ziegler.)

Branch 3, of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America? A. That's right.

Q. In what official capacity were you connected with that organization?

A. Secretary of Local 293, Branches 3 and 4, of the International Brewery Workers of America.

Q. That is the organization which I have just referred to? A. That's right.

Q. For what period of time and over what term did you [115] act as secretary for this last-mentioned labor union? A. From the year 1937.

Mr. McRoberts: Now may I have Plaintiff's Exhibit 2 again, please?

(The document was handed to counsel.)

Q. By Mr. McRoberts: Are you familiar with the practice of adopting and following so-called working rules, followed by the defendant brewery from the year 1936 to 1946? A. Yes, sir, I am.

Q. Were the provisions of those working rules, as they might appear from time to time, lived up to and recognized by the defendant brewery?

A. That's right.

Q. And were approved by you?

A. That's correct.

Q. During the time you have mentioned, from 1936 to July 28, 1946, which last date is the date of the contract pleaded by the defendant, were the provisions of Section 1 (b) of Plaintiff's Exhibit 2, being the working rules I have referred to, recog-

(Testimony of Anton J. Ziegler.)

nized and lived up to by the defendant brewery, which I quote:

“Only members in good standing who are members of Bottlers Local Union No. 293 of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America shall be employed as bottlers in the bottling [116] department at the brewery, including all basements, platforms, storage, and yards used in connection with the operation of the bottling department in positions where bottlers are now employed, or in those branches where employer may require the employment of a steady crew to perform bottlers’ work.”

Were those provisions enforced at the brewery in the years I have designated, from 1937 to 1946?

A. Yes, that’s right.

Q. And did the defendant brewery hire all its bottlers through the union?

A. Through the union.

Q. Will you state to the court the procedure followed by the brewery when it required new bottlers or additions to its crew?

A. When the superintendent in the bottling plant or in the warehouse required help, they would call our office, give us the starting time and the number of men required. We would then call men that were on our list, have them come down to our

(Testimony of Anton J. Ziegler.)

office, and write out a clearance slip for them, which would be presented to the shop steward in the plant.

Q. Did the brewery have any control over the employment of these men?

A. No, they did not.

Q. Do they at this time? [117] A. No.

Q. Now, in the year, July 28, 1946, did you become affiliated with Local Union No. 898, I believe it is—isn't it? A. 896.

Q. 896. And did a majority of the employees in the bottling plant of the defendant brewery join your organization?

A. Yes, they did. We presented the employers with approximately 90 per cent of signed designation cards.

Q. Was that likewise done by the brewing department and the delivery department?

A. With all departments, as I recollect. I sat in the negotiations, and the cards were checked.

Q. It was based upon those cards that you made the demand for the contract of July 28th?

A. That's right.

Q. Are you familiar with the construction of Joint Local Executive Board of California, one of the signatories to the contract, Exhibit "A" attached to defendant's answer?

A. Yes, the Joint Local Executive Board of California is made up of the various local unions in the brewery industry in the State of California.

Q. It is a labor union?

A. Composed of all labor unions. [118]

(Testimony of Anton J. Ziegler.)

Q. That includes the bottling, the brewing, the packing, and delivery departments?

A. That's right.

Q. I show you what purports to be a form of designation card, and ask you if that is the type of card that was signed by the company's employees in the described departments, and presented to you, upon which you based your demands that we sign the contract I referred to.

A. That's right.

Mr. McRoberts: We offer this, your Honor, in evidence as Defendant's Exhibit I, or such other designation——

The Clerk: Defendant's Exhibit A.

The Court: So ordered.

(The document referred to was marked Defendant's Exhibit A, and was received in evidence.)

Q. By Mr. McRoberts: Mr. Ziegler, are you acquainted with Mr. Dobbs and Mr. Ullrich, who testified here in court this morning?

A. Yes, I am.

Q. How long have you known them?

A. Well, I have known Walter Ullrich from the date that he stated he was employed by the Los Angeles Brewing.

Q. Directing your attention to in September of 1946, did you at that time have a conversation with Mr. Dobbs and/or Mr. Ullrich concerning their continued employment at the Los [119] Angeles Brewing Company?

(Testimony of Anton J. Ziegler.)

A. The only conversation in September that I had with them was after they refused to go through that picket line, as of September 23rd. It was two or three days afterward. They, with a group of others, refused to go through, and came down to the office. Some of them had C.I.O. buttons on, and asked if they could go back to work.

Q. Including Mr. Dobbs and Mr. Ullrich?

A. Well, I know Mr. Ullrich was there. I can't recall whether Dobbs was there or not. And they were told at that time, if they would transfer to our organization, we would put them back to work, but that they had gone out on strike, and until they had transferred their affiliations, why, we would not clear them through the union.

Q. Did you offer Mr. Ullrich a clearance or a right to join your organization? Did you offer him membership?

A. Yes, sir. He had that right ever since July 23rd.

Q. And you told him of that?

A. That's correct.

Q. What did he say?

A. He refused to join it. They all had one man as a spokesman, Fritz Huessler, and he made the statement, "We want to go back to work under the same union we left there."

Q. And what was your response to that?

A. "I am sorry. We can't do anything for you."

Q. To your knowledge, has the National Labor

(Testimony of Anton J. Ziegler.)

Relations Board conducted an election in the various breweries, including the defendant brewery, since September of last year, to determine the number represented? A. Yes, they have.

Q. Are you familiar with the outcome of that election? A. Yes, I am familiar with it.

Q. Would you state the results, that is, the vote results?

A. I would have to look at notes I have in my pocket on that.

Mr. McCall: I suggest you make that an exhibit, and I will agree that that is it.

Mr. McRoberts: We have stipulated, your Honor please, that we may introduce the document on the letterhead, "United States of America, National Labor Relations Board. In the Matter of Acme Brewing Company," and so forth, including the defendant here named, which purports to be a tally of ballots, signed by Martin Zimring, whose signature I happen to know and I can verify, because it was signed in my presence, showing the union, represented by the Joint Local Executive Board of California, and Mr. Ziegler, and Mr. Schaffer, and others, received 817 votes, and that the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America received 182 votes. We offer that in evidence as [121] defendant's next in order.

The Clerk: Defendant's Exhibit B.

The Court: So ordered.

(The document referred to was marked De-

(Testimony of Anton J. Ziegler.)

pendant's Exhibit B, and was received in evidence.)

Mr. McRoberts: That is all. Cross-examine.

Cross-Examination

By Mr. McCall:

Q. Mr. Ziegler, where was the vote taken in July—in May, or at any time prior thereto, as to the joining of the Teamsters Union?

Mr. McRoberts: Are we attacking this contract, your Honor, if we may use the word “we” advisedly in these proceedings?

The Court: I don't know whether you are or not. Overruled, if that is the objection.

Mr. McRoberts: That is the objection, your Honor.

The Court: Objection overruled.

The Witness: Would you repeat the question?

Q. By Mr. McCall: Somebody has mentioned that there was a vote somewhere, that some members voted to join the Teamsters. Where was the vote taken, and what are you talking about?

A. Well, to clarify that question, that covers quite a lot. There never was a vote taken to join the Teamsters. [122] There was a vote taken in the International Union in April, 1946.

Q. The International Union of Brewery Workers?

A. Of Brewery Workers, by a conference in Cincinnati, which voted by a very small minority to have an election whether to affiliate with the C.I.O.

(Testimony of Anton J. Ziegler.)

or not, as our International Union was suspended and had been independent since 1941. And at that time the vote was taken. It was a referendum vote. The State of California voted nine to one, or Los Angeles did, rather, nine to one not to affiliate with the C.I.O. Then at a later date we find that by a small majority our International Union was going to affiliate with the C.I.O. Our people in the State of California knew that there would be nothing but strife and chaos in the brewing industry if we went with the C.I.O., so, consequently, there was a meeting and these things were discussed, and through the designation cards in the month of July we affiliated with the A. F. of L.

Q. Yes. In other words, there was no vote taken about joining the A. F. of L.?

A. Yes, there was a voice vote, that on several meetings the men empowered their officers to make whatever arrangements they could to get back into the ranks of the A. F. of L.

Q. Did that mean abandoning and sabotaging or quitting the International Brewery Workers? [123]

A. I don't know what you mean by "sabotaging."

Q. Well, these unions, or, the union of which you were formerly secretary never joined the Teamsters, did it?

A. How is that?

Q. The International Brewery Workers Union, of which you were formerly secretary——

A. Yes.

(Testimony of Anton J. Ziegler.)

Q. —that organization never joined the Teamsters, did it? A. To my knowledge, no.

Q. All right, sir. That is all I want to know.

Now, as a matter of fact, there was never any vote taken to determine who had the majority of the membership out there in any of these plants until this one the other day—on March 27th, was it?

Mr. McRoberts: Your Honor please, the designation cards are in evidence as Defendant's Exhibit A.

The Court: Read the question, please.

(The question was read.)

The Court: "This one"—what do you mean? The one that is indicated by Exhibit B?

Mr. McCall: Yes, sir.

The Court: Overruled.

Have you got the question?

The Witness: Yes, your Honor. The designation cards [124] showed us the way our men wanted to go.

Q. By Mr. McCall: Well, you had some designation cards—I mean, vote taken of the whole place?

A. Designation cards were taken throughout the State of California.

Q. Now, the date on those designation cards was that they were made and being gathered up on June 26, 1946? A. June what?

Q. June 26th. Up in June; that is correct, isn't it?

(Testimony of Anton J. Ziegler.)

A. Well, probably these were signed on June 26th——

Q. Yes, sir.

A. ——and others were signed earlier than that.

Q. I see. And the last sentence of this——

A. No, not June. No, I would say July.

Q. I will ask you if that is the date, “June,” right there (indicating).

A. That is June.

Q. And you have already referred to it as a contract dated July, 1948; isn't that correct?

A. That (indicating) would be a rubber-stamp date.

The Court: Just a moment. You are getting ahead of yourself. You said “1948.”

Mr. McCall: 1946, your Honor. Excuse me, sir.

Q. By Mr. McCall: Now, all the authorizations you have exhibited bear the date of the authorization in June? [125]

A. These three copies, yes.

Q. Yes, June 26, 1946. And referring to the last sentence of these authorizations, it is this: “I subscribe to that certain agreement with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, dated July, 1946.” That is what it says?

A. That is correct.

Q. Then I ask you, is it not a fact that before July, before any Teamsters Local Union was formed, it was known by the men you were circu-

(Testimony of Anton J. Ziegler.)

lating these papers and that there was going to be a contract with the Teamsters in July?

Mr. McRoberts: Just a minute. Your Honor please, may I ask counsel again, and I would like to have some assistance on this point: Are you attacking this contract that I have pleaded?

Mr. McCall: No, I am not.

Mr. McRoberts: Then I object to this question as not probative of any of the issues in this case. When the men signed the contract or when they didn't is not material to it.

The Court: I don't see the relevancy of it, but there may be some relevancy. It is rather obscure, but I will permit it to be elicited. Overruled.

Now, read the question.

(The question was read.)

The Witness: To my knowledge, all of this happened in [126] July.

Q. By Mr. McCall: Do you have any explanation to give as to how each one of these bears the date of June 26th?

A. Unfortunately there was only three represented there. I think if you will check the 90 per cent that were presented to the employers, those were in handwriting. Those happened to be with a rubber stamp. If you will check those in handwriting, I think that you will find the dates of the majority of them are in July, instead of June.

Q. Were any of these authorizations circulated amongst the veterans who were absent in the Army,

(Testimony of Anton J. Ziegler.)

in the armed forces—those that had not returned and gone to work? A. No.

Q. They were not? A. No.

Q. How many men—

A. Excuse me. Now, I didn't quite get that other question.

Q. Were any of these authorizations circulated amongst the men who were in the armed forces?

A. And the ones that have returned? I thought you meant that.

Q. And had not returned.

A. No, they didn't.

Q. They were contacted only if they were then working [127] in the various breweries?

A. That is correct.

Q. Mr. Ziegler, Mr. Ullrich has testified that you told him at the time that they came down there to see you, to get clearance to go back to work, that you told them they were through at Eastside. Did you tell them that?

A. To my knowledge, I don't recollect that. It was stated they would have to clear. I didn't make no assertion as to Eastside, or any place, but that they would have to come over into our organization.

Q. Now, did you offer them or show them some application blanks there?

A. Absolutely. They were offered to them, and they refused to sign them.

Q. Did you tell them that they could sign them, but that that wouldn't mean they would go back to Eastside?

(Testimony of Anton J. Ziegler.)

A. No, I didn't make that statement.

Q. Did you consider it clearing them for East-side, to take their former seniority there?

A. I think our records will show that any veterans that has signed any of our designation cards, have gone back to their jobs and have had no trouble, except with those who refused to go through the picket line. They have all been in the jobs, and we have had no dispute in the bottling industry except those with the union that were affiliated with and [128] formed the picket line and refused to go through.

Q. In this conversation we are talking about, though, I believe your testimony is now that no brewery was named nor place where they could work if they signed?

A. To begin with, I think Mr. Ullrich made the statement here that Mr. Huessler done the talking, and Mr. Heussler was doing the talking. As I recollect, they were offered a card to sign. There was no discussion of "We are going back to work," or anything else. We told him they would have to sign the card before we could talk work with them any place.

Q. They would have to sign the card before you could talk work with them any place?

A. That's right.

Q. Later on, did you receive a call from Mr. Hoff on a Saturday; Saturday, October 5th, while these men were there talking to him?

(Testimony of Anton J. Ziegler.)

A. I don't recall. That is a long time ago, and we have a hundred telephone calls a day that come into that office.

Mr. McCall: You don't recall. All right, that's all.

Mr. McRoberts: That is all, Mr. Ziegler.

(Witness excused.)

Mr. McRoberts: Mr. Hoff. [129]

JOHN G. HOFF,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: John G. Hoff, H-o-f-f.

Mr. McRoberts: For the benefit of counsel, Mr. Hoff is slightly hard of hearing.

By Mr. McRoberts:

Q. Mr. Hoff, would you state your business or occupation, please?

A. Superintendent of the bottling department, Los Angeles Brewing Company.

Q. How long have you held that position?

A. Twelve years.

Q. Twelve years? A. Twelve years.

Q. Are you acquainted with Mr. Dobbs and Mr. Ullrich? A. I am.

(Testimony of John G. Hoff.)

Q. Were they formerly employed by you?

A. They were.

Q. By the way, from what source do you procure your bottlers? I will withdraw the question.

Since July 28th of last year, from what source have you procured your bottlers? [130]

A. Procured them?

Q. Yes. A. Through the Local Union.

Q. Through Mr. Ziegler, who just preceded you on the stand? A. That's right.

Q. Before that time, you likewise procured your bottling employees through Mr. Ziegler?

A. Through Mr. Ziegler.

Q. Now, directing your attention to September 23rd of 1946, did Mr. Dobbs and Mr. Ullrich report for work on that morning?

A. Not on the morning of the 23rd.

Q. Do you know why they did not?

A. Not exactly, no.

Q. When did you first see Mr. Ullrich or Mr. Dobbs following the 23rd?

A. It was either the following Wednesday or Thursday. I am not sure of the time.

Q. The following Wednesday or Thursday. Did you at that time have a talk with them?

A. There was a group of about nine came in to see me and asked me if they could go back to work.

Q. And what did you tell them?

A. I told them, well—first of all they asked me if [131] they were fired. And I asked them,

(Testimony of John G. Hoff.)

“Why?” And they said so they could make application for unemployment. That was just some of them; not all of them. And afterwards they asked me if they could go back to work, and I told them they would have to go to the Local Union and get an application or permit, and then come to me and I would put them back to work.

Q. You had fired Mr. Ullrich and Mr. Dobbs previously, on the 23rd, by notifying Mr. Ziegler to send you more men; is that correct?

A. That's right.

Q. And on the 23rd there was a picket line maintained around the brewery by various members of the C.I.O.; is that correct? Or, at least, by the International Union of Brewery Workers?

A. It started on the morning of the 23rd.

Q. Now, did you have a subsequent conversation with Mr. Dobbs or Mr. Ullrich concerning their re-instatement or re-employment, or again taking up their work with the brewery?

A. The following Saturday of that week, the week of the 23rd, Mr. Dobbs and Mr. Ullrich and Mr. Busick, they came to see me, about, I think it was around 10:00 o'clock in the morning, and told me they would like to report for work Monday morning. And I told them the same thing I had told them on Wednesday, that they would have to go down to the Union Local and get a clearance, and come back and I would put [132] them to work.

Mr. McRoberts: That is all.

(Testimony of John G. Hoff.)

Cross-Examination

By Mr. McCall:

Q. Did you call anyone up at that time?

A. Pardon?

Q. Did you call anyone up at that time?

A. Yes. On Saturday morning, when they came back the second time, I told them there was nothing I could do, that they would have to get clearance through the union to go to work. They asked if I would call, and I called, and Mr. Fowler answered the telephone there, and he told me to tell them to come down and see them.

Q. What did you tell the men?

A. I told the men to go down and see Mr. Ziegler. Mr. Fowler, I think, is his assistant; an assistant to Mr. Ziegler.

Q. Mr. Hoff, did they report to you that they had been down to see Mr. Ziegler?

A. I don't know whether they went down to see Mr. Ziegler.

Q. Didn't they tell you they had been down to see Mr. Ziegler, and his response was that there was nothing he could do about it?

A. Yes, sir.

Q. Didn't they tell you they had been to Mr. Ziegler, [133] and that that prompted you to say, "Then there isn't anything I could do for you"?

A. I didn't—

Q. I wonder if you understood from them, or did they tell you on Saturday morning, October 5th,

(Testimony of John G. Hoff.)

that they had been to see Mr. Ziegler and they couldn't get cleared?

A. They told me they were down to the local. They didn't tell me who they saw.

Q. But they told you they had been down there, and they told you they couldn't be cleared?

A. No, they asked me to go back to work on Monday. That was on Saturday. When they asked me to go back to work on Monday, I asked them if they had been down to the local on Wednesday. They said they were. I told them I couldn't put them back to work until they had a clearance from the union, and that is when I called up for them.

Q. You called up, and nothing was said then about going back to work, or what was said about that? What did you say to them after you came out from the telephone?

A. When I called up the local, Mr. Fowler told me to tell them to come down and see them down at their local. So I told Mr. Ullrich, Dobbs and Busick to go down to the local again, that Mr. Fowler wanted to see them down there, and then they left and come back no more.

Q. How long did the picket line stay out there?

A. How long did they stay there?

Q. Yes.

A. From September 23rd until March 26th, I think, or 25th. Now, I am not sure of that date, but I think it was the 25th or 26th of March.

Q. Then the election was held on the 27th?

(Testimony of John G. Hoff.)

A. On the 27th, that's right. There was no picket line on the day of the election.

Mr. McCall: I believe that is all.

Mr. McRoberts: That is all. You may be excused, Mr. Hoff.

Do you wish his attendance in court, your Honor, or counsel?

The Court: No.

Mr. McCall: No.

(Witness excused.)

Mr. McRoberts: The defendant rests.

The Court: We will take a recess for about five minutes.

(A short recess.)

The Court: Proceed, gentlemen.

Mr. McRoberts: I have rested, your Honor.

Mr. McCall: Mr. Dobbs, will you take the stand, please. [135]

SAMUEL M. DOBBS,

called as a witness by and on behalf of petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Samuel M. Dobbs, D-o-b-b-s.

By Mr. McCall:

Q. Mr. Dobbs, you are a petitioner in this case?

(Testimony of Samuel M. Dobbs.)

A. Yes, sir.

Q. And it was stipulated this morning that you would testify the same as Mr. Ullrich?

A. That's right.

Q. So that obviated the necessity, then, of having you on the stand. I will ask you, though, if you were present on October 5th, when Mr. Ullrich returned to the plant of the Los Angeles Brewing Company and saw Mr. Hoff.

A. I was.

Q. Did Mr. Hoff at that time say anything to you men about going back to see Mr. Ziegler or Mr. Fowler at the Bottlers Union or the Teamsters?

A. No, sir.

Q. Now, state to the court, in brief, what did take place at that conversation.

A. Mr. Hoff said——

Q. Speak loud so that the Judge can hear you.

A. Mr. Hoff said that he would just as soon take the three of us back to work, but that his hands were tied, that he couldn't do anything about it, but he would call up and find out. So he went in to the phone in the guards' booth outside of the brewery there, and he come back in a few minutes and he said, no, that he couldn't do anything about it, that he couldn't take us back to work.

Mr. McCall: That is all.

Mr. McRoberts: No questions.

Mr. McCall: Step down.

(Witness excused.)

Mr. McCall: Mr. Ullrich.

WALTER F. ULLRICH,

recalled as a witness by and on behalf of petitioners, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. McCall:

Q. Mr. Ullrich, prior to the trip that you made to the Los Angeles Brewing Company plant on the morning of October 5, 1946, did you confer with Mr. Koenig of the Selective Service System?

A. Yes.

Q. Did you return to the plant that morning upon his instructions? [137]

A. Yes.

Q. When? A. October the 5th.

Q. Now, in that conversation that you had with Mr. Hoff that morning, did he tell you or indicate to you that you men should go back to the Teamsters or Bottlers Union for clearance, or other effort?

A. No, not at that time. He said that he had orders that he couldn't hire us and put us back to work.

Q. He had previously, in the previous conversation you had with him on the previous Wednesday—

A. No, that was the 30th that he told us to go down to see Ziegler.

Q. The 30th was on Monday?

A. That's right.

Q. And you asked him then to go to work, and he told you to see Ziegler?

A. Yes, sir.

(Testimony of Walter F. Ullrich.)

Q. But on the following Saturday, after you had been down to see Mr. Ziegler, you returned on instructions of Mr. Koenig to see Mr. Hoff, and did he at that time tell you to go back to see Mr. Ziegler or Mr. Fowler?

A. No, not at that time. He just simply said he had orders not to put us back, and he made a phone call at that time, and he said he was sorry, that he couldn't do anything [138] for us.

Q. And that is all? A. That is all.

Mr. McCall: I believe that is all.

Mr. McRoberts: That is all.

The Court: Whom did he call up, Mr. Ullrich, do you know?

The Witness: Well, that is something that I don't exactly know, whether he called Mr. Ziegler or Mr. Lick. I don't know who he called at that time. He didn't say. He just simply come out and said, "I'm sorry, I have orders not to return you to work."

The Court: He didn't call that person in your presence?

The Witness: No. We were talking to him out in front of a little gate, and he went in the front there, where they have the phone in the office.

The Court: Is that when he said that he was sorry?

The Witness: At that visit. That was the last time I was over there.

The Court: That was all there was to it, was it? There was nothing else after that?

(Testimony of Walter F. Ullrich.)

The Witness: No, not after that. There wasn't much said, no.

The Court: Why did you go down to see Mr. Ziegler? What was the idea of going down to see Mr. Ziegler? [139]

The Witness: When?

The Court: Why?

The Witness: That was the visit we had with Mr. Hoff on the 30th of September. He said we had to go down to see Mr. Ziegler to get a clearance from the union so we could go back to work.

The Court: It wasn't the brewery, then, that had the say as to whether you could go back to work, was it?

The Witness: Well, in this particular time we went to see Mr. Hoff, why, we had to go to see the secretary of the Teamsters, which was Mr. Ziegler.

The Court: In other words, the brewery could not put you to work until the union said something?

The Witness: Yes, sir.

The Court: And the union didn't say so, and, therefore, you didn't go?

The Witness: Yes, sir.

The Court: That is about the size of it, isn't it?

The Witness: That's right.

The Court: I suppose that you could have gone to work if you had signed up?

The Witness: Well, I don't know how things

(Testimony of Walter F. Ullrich.)

would have worked out that way. I was in good standing when I left for the service, and we had good conditions. We were making good money, and that is the same conditions we had at that time, so I didn't know why I should sign for another organization. This one had represented me since 1934.

The Court: I don't know, either, except there was a contract there to which the Brewing Company had agreed.

The Witness: Well, I guess that is something that went on more or less while we were away.

The Court: Yes, I understand.

Mr. McCall: That is all.

The Court: That is all.

(Witness excused.)

Mr. McCall: Mr. Koenig, will you please take the stand.

V. H. KOENIG

recalled as a witness by and on behalf of petitioners, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. McCall:

Q. Mr. Koenig, did you have a report from Mr. Ullrich or Mr. Dobbs on October 5, 1946, after they had been to see Mr. Hoff?

(Testimony of V. H. Koenig.)

Mr. McRoberts: Just a moment, please. For the purpose of the record, Mr. Koenig is not an employee of the defendant. He is not in an administrative capacity for the Government or for any agency having jurisdiction over labor matters.

The Court: It is a part of the chain of proof. I think [141] the record should be complete as to just what these proceedings were, in the efforts of these men to get a job in the face of labor union objection. Overruled.

The Witness: I couldn't say. If October 5th was on Saturday, I didn't hear from them on Saturday, but I did hear from them after they had gone back to the Eastside Brewing Company or the Los Angeles Brewing Company.

Q. (By Mr. McCall): You had advised them to go back to see Mr. Hoff, had you?

A. Yes. You understand, Mr. McCall, that was the culmination of a dozen different meetings that were held with different union and brewery officials, and there was nothing, apparently, further to be done, and I instructed them to go over and make a formal demand for their position. And I called Mr. Lick beforehand and told him I was sending them down, and asked them to report to me, which they did. And after they reported to me, I called Mr. Lick and had a telephone conversation with him.

Q. What was that conversation?

A. I said to him, "These boys I sent over report to me you won't put them back to work without

(Testimony of V. H. Koenig.)

them having a clearance from the Teamsters Union, and the Teamsters Union won't give them the clearance." I said, "I sent them over so that they would specifically make the demand. I don't want to proceed further with the matter if there is any misunderstanding [142] as to what occurred at your place."

And he told me, "No, there is no misunderstanding. We refuse to re-employ them unless they hold clearances from the Teamsters Union."

I then told him he was faced with a liability for compensating them for loss of wages. He said he understood that.

Mr. McCall: That is all.

Mr. McRoberts: That is all.

The Court: Was there anything done after that, Mr. Koenig, in the way of their going back to work at all?

The Witness: No, that was my final, closing conversation and posting my file to the United States Attorney's office. There had been, of course, prior to that, much negotiation.

The Court: In other words, the attitude of the employer throughout was, wasn't it, that in the absence of this union agreement the employer never asserted any claim that he wouldn't re-employ these veterans?

The Witness: Are you limiting it to the Los Angeles Brewing Company?

The Court: I am speaking about these three

(Testimony of V. H. Koenig.)

gentlemen here.

The Witness: Yes, limiting it to the Los Angeles Brewing Company, I would say no.

The Court: Why would you say no?

The Witness: There were other brewers involved in other [143] cases, involved in these series of negotiations.

The Court: I am not speaking of those. I am speaking of these three veterans.

The Witness: I understood your question——

The Court: Wait a moment. I want you to understand it, and if you don't, you can tell me and I will clarify it. I want you to thoroughly understand it.

As to these three veterans who are asking for their positions, at any time did the brewery—I am not speaking about union representatives; I am speaking about the brewery—refuse, as distinguished from union representatives, or at any time manifest or say or indicate that if it were not for this contract, or, that because of this contract they weren't able to employ the men, and wasn't that the sole reason which they gave for not taking them back?

The Witness: Every time but once.

The Court: Which one was that?

The Witness: That was—if I may have my notes here, I can give you the date of my conversation with Mr. Lick. On October 31st I called Mr. Lick and left a message. November 1st—he called me

(Testimony of V. H. Koenig.)

back November 1, 1946, and he told me that relative to Iob he had forgotten to tell me in the previous conversation that he had been discharged because his work was unsatisfactory.

I told Mr. Lick that was an amazing statement to make at [144] this time, after the previous meetings we had had with him and with officials of the brewery, in which that had never been raised or never even suggested, and it was entirely new; and, further, that in view of the construction placed by the courts on the obligation of employers, that I didn't think that eight days work was a fair trial to determine whether or not the man was capable of performing his work or to draw a conclusion as to his work being unsatisfactory.

And then Mr. Lick stated to me: I guess there was only one thing for him to do, and that was to put the veteran back to work.

The Court: He did put him back to work, didn't he?

The Witness: On November 6th, yes.

The Court: He did put him back to work?

The Witness: Yes. That one statement was made on that one occasion.

The Court: So that, so far as that statement is concerned, he retracted from that and put him back to work?

The Witness: That's right.

The Court: Then the only reason following that why he couldn't continue in the work was because the union balked it; was that it?

The Witness: That is correct. [145]

* * *

The Court: Now, where is the reasonableness of issuing an edict or an injunction to the brewery, not to the union? I agree with you that we ought to be able to, but we haven't the power. That is the power of the National Labor Relations Board.

Mr. McCall: Here, your Honor——

The Court: Wait a moment. You want to do all of the talking and not any of the listening. I would agree with you if we could issue an injunction to require the unions to settle their differences so that the men that desired to could go to work. That is the situation in which we would like to find ourselves, but we have to take the conditions which the case presents, and that is this: Here are three good workmen who are union men, who were union men in that brewery, and who went into the military service, who got an honorable discharge, and who come back and go to the brewery and ask for their jobs, and the brewery says, "Why, yes, we are glad to have you here." The impasse they meet is not with the brewery. It is with a labor union organization that says, "No, you cannot work here unless you belong to our crowd."

Where is the unreasonableness of saying to the employer, "Well, we cannot help that. You just have to take care of [160] that yourselves. We are going to issue an injunction and put these men back to work."

When that is done, do you suppose there is going to be peace and concord and a nice relationship?

Mr. McCall: There will be.

The Court: Then why didn't you settle the case, if that is the situation?

Mr. McCall: Because, your Honor, these men want a determination as to whether or not it is the right of a veteran to go back to work.

The Court: They have that.

Mr. McCall: If your Honor will rule that way, the rest of this case will be over.

The Court: How are you going to enforce it? You cannot rule without enforcing your ruling.

Mr. McCall: The unions will not go out on strike.

The Court: They have not appeared here, of course, excepting that the evidence shows the attitude of the union that has the collective bargaining agreement here. It was the attitude of those men who testified here representing the group that had the collective bargaining agreement that they opposed these men remaining on the job. They were put back on the job, or one of them worked there for a while.

Mr. McCall: All three of them.

The Court: Then the union interposes itself; not the [161] employer. What is the employer going to do, where he has these two discordant, dissident organizations of union workers? You are going to have continuous chaos, strife, and nobody working, and eventually the factory is closed down

because there is nobody working. If you can get these people together, I will give you a continuance here. You seem to think you can.

Mr. McCall: No, your Honor, it will not do any good. They are taking the position that it is their legal right to demand that these men not work. That is the union's position, that it is our legal right to demand that they do not work.

The Court: We will make a finding in this case—I will hear from the other side, but I think the Court will make a finding that these veterans have a legal right to work in that brewery, but I don't know how we are going to enforce that right, and I am not going to issue an injunction which will be ineffectual.

Mr. McCall: If your Honor will rule that way, I will state to your Honor that that will be the end of this case.

The Court: I will hear from the other side before I make that ruling. You mean you will not ask that the Court issue a mandatory injunction?

Mr. McCall: Not at this time. But if your Honor will find that is their right it will put an end to this litigation, because I know that the union will not undertake a [162] violation and go against that by calling any strike, and there isn't going to be any interference with the work there.

The Court: I am confident that you feel that way, but you are not controlling these labor unions.

Mr. McCall: No, sir, but I have dealt with enough of them to know that the labor unions will not do that.

The Court: The Court is with you on this phase of the case, Mr. McCall: There is not a thing that would justify this Court in declining to make a finding or to draw a conclusion that these three veterans are entitled to their jobs back in the Los Angeles Brewing Company; not one scintilla of evidence that would justify it excepting that one phase of the case, in which the objection is interposed to them, not by the man that wants to pay them their wages or to give them back the jobs which they had, but by a group of labor union organizations who say, "Unless you sign up with our union, you cannot get a job."

The Court is with you to that extent. The Court is not with you to this extent, and will not do it, because it would create trouble, discord, confusion, and ultimate chaos in that business, which would result not only in the business itself having to go out of activity, but every man in the place losing his job: it will not issue an injunction because under Section 8 of the Act it considers that the issuance of a mandatory injunction under those conditions is an [163] unreasonable and unjustifiable act.

Mr. McCall: If your Honor will find that these men were entitled to their jobs, without any order carrying it into effect at this time, I will talk with the Teamsters Local, and I can assure your Honor now that they will not call any strike about it.

The Court: Let's hear from the other side. What do you have to say about it?

Mr. McRoberts: Your Honor please, much as I regret to doubt Mr. McCall, I doubt very much whether he can speak for the Congress of Industrial Organizations. The evidence so far has been contradictory to it. I feel that there will be strikes, boycotting, and other things. We have had continuous labor disputes since last September and until this election was held. So far as the finding that the veterans are entitled to their jobs as veterans, that is one thing, but if it is determined that they are entitled to their jobs as a matter of right, then we invade the province of the N.L.R.B., because the N.L.R.B. has said that the bargaining agent is the Joint Local Executive Board of California, with whom we have contract, and the election has been held and it has been determined to be the collective bargaining agent.

The Court: I am not at all concerned about the function of the National Labor Relations Board as a judicial prerogative. Those are two different matters, in my judgment. [164]

* * *

The Court: I want you to understand, both of you, that the Court's attitude is to accomplish something effectively for these veterans, if it can be done within the framework of the law. I cannot see how the Court has any power to issue an injunction, a mandatory injunction, to require the defendant brewing company to reinstate these men, because I think it would be an unreasonable attitude, and I apprehend that the consequences that would ensue by such an injunction would be more disastrous to

the workers, all of them, including the veterans, than to deal with the case otherwise. If you feel that you can get these discordant, dissident labor union organizations together and agree upon reinstating these men with the finding that if it were not for the labor union activities the injunction should issue to reinstate them, I will be very glad to continue the case to permit you to do it.

Mr. McCall: If your Honor please, where two labor unions have been out fighting each other for years, now eleven or twelve years, I don't think that I can assure you that I can settle that dispute, the general dispute, but what I do say to your Honor, and I am confident of this fact, is [171] that if your Honor will rule that the Selective Training and Service Act requires that these men be put back in their jobs, that there will be no strike.

The Court: How about the brewing company? Suppose a finding of that kind is made, the brewery is of the same attitude that it was during the time that they were working there, is it not?

Mr. McRoberts: Yes. We would be locked up; we would be out of business.

The Court: No, I am not asking you about that. What is the attitude of the brewing company if Mr. McCall can accomplish what he thinks he can accomplish?

Mr. McRoberts: If your Honor please, we have no attitude. It is all right with us if Mr. McCall can do it. I tried to do this very thing, that Mr. McCall says he is going to do, but I feel it cannot

be done, that the Teamsters will not allow these men to go back to work unless they are members of the Teamsters, and that we might as well face the facts about it.

The Court: There is no way by which we can, by injunction, under the facts of this case, put them back to work, because the inevitable result of the injunction would be trouble and would not get them their jobs. It would be a different situation if they would get their jobs and if the other men would continue to work and business would go on, [172] but instead of accomplishing that, nobody would get any work. I am not going to issue an injunction because the law says clearly we should not enter into a labor dispute, and I think it is a very salutary measure excepting as to these jurisdictional disputes. These national legislators would not be arguing in Washington for weeks if it was just as simple a problem as you suggest, Mr. McCall.

Mr. McCall: Would your Honor give me another moment?

The Court: Yes, certainly.

Mr. McCall: In the trial memorandum there was cited the cases of National Labor Relations Board v. Mason, National Labor Relations Board v. Electric Vacuum Cleaner Company, and also National Labor Relations Board v. The Wallace Corporation. In each one of those cases the court ordered the employer to restore certain men to their employment with back pay. There was an order of the National Labor Relations Board, and there was a jurisdic-

tional dispute, and a tussle between two unions in each one of those cases. The National Labor Relations Board heard the facts and found it was an unfair labor practice and ordered the employer to do this, that, or the other. The Ninth Circuit Court of Appeals and other Circuit Courts of Appeal entered the order or denied it, and where it was denied the Supreme Court overruled them. Now, that has been done regularly, if your Honor please, the issuing of injunctions in connection with labor disputes. The decree of this Court and its opinion as to what the rights of these men are is not a nullity and the Teamsters are not going to override it.

The Court: I think I know more about that than you do, Mr. McCall, with all due respect to your opinion, because I have sat in in many of these cases. The decree, as you term it, of the National Labor Relations Board is subject to review in the Circuit Court of Appeals, and then on certiorari to the Supreme Court, where it becomes final. That is the forum in which these proceedings should take place to conform with the present state of the law. Congress has set up this machinery. Even assuming your argument is correct as to the modified power of the Court under the Selective Training and Service Act, Section 8 of that Act, a mandatory injunction from this Court—assuming there is jurisdiction to issue it, which I doubt very seriously, with due deference to your very able presentation of it—does not have the same effect or security, as far as labor union organizations are concerned, as does the order

of the National Labor Relations Board. I think that is plain, that that Act was designed more for the protection of the worker than it was for the employer. Isn't that true?

Mr. McCall: I think that is true, your Honor.

The Court: And that the question as to what constitutes an unfair labor practice applies usually to the employer. [174] I don't know of any cases at all, and whether it could be presented I have not made a close enough study of that feature of the Act to determine it, but I don't know of any cases in which there has been presented in these jurisdictional disputes a complaint made by one union organization as against the other, but not against the employer, and it has been determined to be an unfair labor practice. If there are any such, I don't know.

Mr. McCall: No, your Honor, an unfair labor practice would be directed against the employer. That is true, but his relations with one union as against the other is the basis of those charges of unfair labor practice.

The Court: I understand that, but you get then into the realm of fiction instead of reality, just the same as you did under the "yellow dog" contract, so-called. You discuss something academically, you talk about the individual right of a man to work, and all of the other sophistical arguments used in support of the "yellow dog" contract, so-called. Now, it is collective bargaining that has brought about these benefits, but unfortunately and unhap-

pily the collective bargaining has not been the sole criterion. These separate organizations of workers set themselves up and then they get the employer between the two so that he cannot move. If he moves one way, he has a strike. If he moves another way, he violates a collective bargaining agreement. [175]

I have told you what the court's attitude is. If you think you can get them together, I will give you an opportunity to do so.

Mr. McCall: Here is what the situation is. It doesn't do me any good to go down and ask these men to do something if your Honor doesn't rule that the veterans are entitled to their jobs. If your Honor will hold that, without issuing any further order upon the facts of this case before I ask any further step be taken, and your Honor said you would not grant any injunction in the matter, then I feel I can secure from those men the agreement that they are not going to do anything about it. But I can't do anything, your Honor, unless your Honor passes on the veteran question. The question of law from there on and the relief to be given is a matter that can be framed, as your Honor says, and I can state to your Honor that there will be no further complications about it. [176]

* * *

The Court: Yes, I think it is. The whole scheme of this industrial legislation has been to set up an entity into which all of the labor disputes will be brought. It is restrictive in its terms because of the necessity of bringing about a change in labor

relations, because, unhappily, as that change was wrought and as these difficulties increased, there weren't modifications of the Act to meet the changed conditions. Then these separate organizations came into being. Instead of there being one organization, there were several, particularly two major groups, which were struggling for position, and there seemed not to be the appropriate machinery in the law to meet that changed condition.

Then the war comes on and the veterans' rights are written into the Selective Training and Service Act. Section [177] 8 provides, as I have read, that where there are unreasonable or impossible conditions that have ensued, those may be a reason why the veteran cannot enforce his right to reinstatement, and that is a reasonable feature in the law. The law should not be so written that it will create an impossible situation, an unreasonable situation.

Now, what do we find in the concrete case to meet the history of the legislation as I have outlined it? We find a brewery here that was running before the war, in which these veterans were working. At that time they were members of a labor union organization of their own choosing. After their patriotic service and honorable discharge, they come back and ask for their jobs. The brewery says, "We will be glad to have you here," and gave them a job, some of them at least, and reinstated them in the work, and there is no objection made to their work. There could not be. Their efficiency apparently is

not questioned at all. There has been no evidence here to show they weren't doing a fair day's work for a reasonable wage. But a third instrumentality interposes itself, which had previously made a contract with this brewery.

Now, there is no evidence to show—and I understand what you will want to say, Mr. McCall—at least, the place to determine that question is before the Labor Board, I think, and to get an adjudication as to whether or not that is the [178] collective bargaining agency and to determine whether that contract is a valid collective bargaining agreement.

Now, what did you want to say in that connection?

Mr. McCall: I was going to say at this time, your Honor, that this contract was not entered into before these veterans returned. It was entered into afterwards.

The Court: It was while they were away fighting battles that the workers in the brewery, together with the brewery, entered into that agreement. That is very true; there is no doubt about that.

Mr. McCall: No, they were then working. They had returned and been put back on the job.

The Court: The agreement was dated in July, I believe?

Mr. McCall: And two of them had come back in April.

The Court: But I mean all of them. One came back in September.

Mr. McCall: One, yes.

Mr. McRoberts: Two of them were back at the time the contract was made, and one had returned but had not yet re-entered employment.

The Court: If there is any difference as between them, that is right. I was trying to treat the veterans on the same level. If there is any difference, I suppose the man who was away in the military service at the time of the collective bargaining agreement would be in a preferential [179] status over those who were here and could have participated in it. I was trying to see whether or not the three veterans should not be placed on the same level so far as their rights to work were concerned. When they returned, when the three of them returned, they were confronted with a situation where the employer said, "We are glad to have you here. You are good workers, there is nothing against you in your working record, and we want you here." They go to work; some of them. Then the third instrumentality, and it isn't either the employer or the worker, but just a separate, discordant, dissatisfied labor union organization, says, "Oh, no, you can't do that. If you fellows are going to work here, you have to sign up with us."

The law has recognized these collective bargaining agreements, they have the approval of the law, and they should have. There isn't anything more helpful to the working man than the collective bargaining agreement, but it is the difficulties that have been brought about by the labor union organizations that have caused the trouble in these jurisdictional disputes. It isn't a question of work. It is a question of who shall control things that creates the difficulty, and until those laws are amended the courts have to

apply the relief to the situation as they see it. I do not see that under any circumstances we can issue an injunction in this case against the defendant Los Angeles [180] Brewing Company.

The court is prepared to adopt the statements that it has made from the bench as to the findings in this case, and to deny the injunctive relief, and to hold that because of the language of the statute in subsection (b) of Section 8 of the Selective Training and Service Act, found in Section 308, Title 50 of the Appendix of the United States Code Annotated, that the injunction should not issue; and that if, in order to place the petitioners in the positions which they held at the time of their going into the military service, it is necessary that some equitable process or injunction or restraining order or mandatory edict should be issued by this court, that the circumstances shown by the evidence and the employer's circumstances, as shown by the evidence, have so changed since the workers' return as to make it impossible and unreasonable for this court to by its injunctive process place them again in their positions.

Now, if you want to adopt the findings of the court as the formal findings, you may do so. It is satisfactory to me, if it is satisfactory to both of you.

Mr. McRoberts: I will ask to have a copy of the court's remarks transcribed.

The Court: I think this is not just simply a lawsuit. This matter involves work, labor, industry, industrial relations, peace, the opportunity to do

a good day's work for a [181] fair wage, and if you feel that the court's observations as to the rights of these veterans to be restored to their jobs is helpful at all, you may state that the court feels they should be restored to their jobs. But so far as issuing any injunction is concerned, it is simply out of the question. I would feel culpable in furthering labor unrest and disturbances between laboring men, which accomplishes nothing except to furnish food to people who do not work.

If you think you can do something, Mr. McCall, and you also, Mr. McRoberts——

Mr. McCall: I don't understand, your Honor, exactly what is to be done. In other words, there would be findings and a judgment of the court.

The Court: If you can settle this matter insofar as getting these men back on the job is concerned, then I think the court could enter a judgment that during the interim they are entitled to their wages. If this was simply a question of wages, it would be a simple problem. It is not a question of wages because the year period has not yet expired. The evidence shows that these men are not able to get other employment. There has been no dispute on that, so far as the brewery is concerned. They offered no evidence to controvert that showing. They have been maintaining themselves on unemployment insurance, some of them, plus the benefits which they received from their organization on account of this cessation of work, the condition in which they find themselves. I do not feel that they should be penalized for that.

Mr. McCall: I don't understand exactly what the terms are, your Honor, or what is expected. Is your Honor undertaking now to decide the matter and dispose of it?

The Court: So far as I can at this time, yes, with the understanding that if you think you can, through the good offices of yourself and the attorney on the other side, Mr. McRoberts, and these leaders of the union that are involved, get together and settle this matter, that you do so. We want to do that if we can. The court is stepping out of its judicial orbit to see if this situation can be adjusted. Mr. McCall thinks it can be. But it is not going to be done by an injunction.

Mr. McCall: Well, if your Honor please, here is all I want, and there is nothing that I can do without it. If your Honor would find that these men were to be re-employed and were unlawfully discharged without cause——

The Court: I am not going to find that.

Mr. McCall: There is no way that I can do anything without that. If your Honor would find that, even though your Honor might not issue an injunction, I can assure you that I can go to these Teamsters officials and lay the matter before them, and say, "Now what?" [183]

The Court: You find out if they will do that, and then come into court and enter into a stipulation. I am inclined to think that you may find this the situation: that if this court should make the finding that you have suggested and that it would

not appear to be satisfactory, there might be an application made to the court, based upon its findings, for the issuance of an injunction.

* * *

Mr. McCall: I don't know, but I think without a finding of a discharge without cause there would be no ability on our part to do anything.

The Court: I cannot make any such finding because they were not discharged without cause. I will make this finding, that they were discharged because of economic pressure and the enforced effective contractual mandate of the party to the so-called collective bargaining agreement. If that would help you at all, I will make that finding.

Mr. McCall: No, your Honor. I was unable, your Honor, to discuss the case of the National Labor Relations Board v. Mason; that is, the construction of whether or not a [184] closed shop contract applied to men then employed by the company.

The Court: I might say that last night I referred to the language in this case in New Jersey, and I do not see much difference here realistically between the situation that was before that court and here.

Mr. McCall: I don't know that case, your Honor.

Mr. McRoberts: That is the Chatillon case.

The Court: Kemp v. John Chatillon & Sons, decided February 7, 1947. [185]

* * *

I don't know whether that is the case here or not. I do not believe there has been any evidence to indi-

cate either way, whether the results of the contract were more beneficial to the workers concerned or not.

Mr. McCall: They got a slight increase.

The Court: Then the same thing would apply here which the judge says applied in this New Jersey case. Continuing with the opinion: [188]

* * *

Mr. McCall: If your Honor please, there is nothing that I can do without a finding such as I have stated, so that it is impossible to move. The only thing I can do is to get the findings in shape and the decree.

Mr. McRoberts: We will wait until the reporter can get us a transcript.

The Court: Very well. You two gentlemen may be able to use your good offices and see what you can do. Perhaps Mr. Ziegler may be able to do something towards ameliorating this condition. If you can do that, the veterans ought to be put back on the job.

Mr. Roberts: We will meet with them at any time. [190]

* * *

Los Angeles, California, Thursday, June 5, 1947

10:00 A.M.

The Clerk: 6322-M Civil, Fred Elia Iob, et al., petitioners, vs. Los Angeles Brewing Company, Inc., a corporation, et al., respondents, hearing order to show cause, and so forth.

The Court: Proceed.

Mr. McCarthy: May it please the Court. My name is P. H. McCarthy, Jr. I appear specially on behalf of Brewers, Maltsters and Yeast Workers Local Union No. 893 of the International Union of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Thomas Vacca, a named respondent; and J. S. Allwine, who was served but who was not named in the pleadings at any stage.

I have not seen the Clerk's file, but unless I have been misinformed there is no return of service on file, or, if there is, it shows service on the 2nd day of June, 1947.

The Court: There does not seem to be any in the file, Mr. McCarthy.

Mr. McCarthy: I spoke to the Marshal's office by telephone from San Francisco yesterday, and the Marshal's office advised me that the only service that was made was made on the 2nd of June. Your Honor will recall that the order to show cause states that service on or before the 29th day of May will be deemed sufficient. I suggest to your Honor that the failure to make service in that time is not only a violation of the order, but also a violation of the Rules of Civil Procedure, which govern the processes of this court. [194]

* * *

The Court: I think we should confine the proceeding to ascertaining whether the parties litigant or those concerning whom it is sought to make litigants are before the court.

Mr. McCall: I haven't the return, your Honor. The Marshal who has the paper will be available at 11:00 o'clock.

The Court: We will wait until he comes. So far as that is concerned, there isn't any on file, unless the Clerk has got something this morning that he hasn't filed—— [199]

The Clerk: No, your Honor.

The Court: The Clerk says there isn't anything in the file that indicates when, if at all, service was made. They are raising the point that sufficient service was not made. The only way a court can proceed, and it will proceed when that is done, is to have the parties before it. [200]

* * *

The Court: Let me understand that, Mr. McCarthy, because that goes to the crux of this proceeding this morning. You [227] mean by "jurisdiction," jurisdiction of the subject-matter, do you not?

The Witness: Yes, your Honor. The court has the right to decide whether or not it has jurisdiction, and the court can obtain jurisdiction of the parties by proper process.

The Court: Why don't you appear, so that the court can determine that question of jurisdiction?

The Witness: I told counsel—I stated in open court, your Honor, that insofar as we are concerned, if an arrangement can be made for a date which will make it possible for us to prepare to argue this matter, I am satisfied my people will authorize me to appear and argue it.

The Court: Whom do you mean by your people?

The Witness: The Brewery Workers, generally. Specifically, in this action, it would have to be the particular Brewery Workers Locals that are named and the Joint Board. [228]

P. H. McCARTHY

resumed the stand as a witness herein and, having been previously duly sworn, testified further as follows:

Direct Examination
(Continued)

* * *

By Mr. McCall:

Q. Are you appearing for Local 893?

A. Appearing specially, yes, sir.

Q. All right. When was that local chartered or organized?

A. That was originally No. 7 of the old International Union.

Q. I didn't ask you that. I asked you when was the charter for 893 issued. You can answer that.

A. No, I can't; not the way you want it answered. Local 893 is the successor of Local 7.

Q. You want to argue it. I said, when was the charter issued? What was the date? In what year?

A. By the agreement dated July 25, 1946, with the International Brotherhood of Teamsters, a charter was issued as of that date to Local 893, for the purpose of preserving its rights to——

(Testimony of P. H. McCarthy.)

Mr. McCall: I object to the rest of that as argument.

The Witness: I am sorry, it is not. [246]

Mr. McCall: I object to it as incompetent, irrelevant and immaterial.

The Witness: It is a fact, if you will read the agreement with the International Brotherhood of Teamsters, and you will see it is.

Mr. McCall: Shall we introduce the original charter?

Mr. McRoberts: I believe it is already in.

Mr. McCall: I think so.

The Witness: I didn't know that because I wasn't present.

Q. (By Mr. McCall): This Local 893 was chartered on July 23, 1946?

A. By agreement between Local 7 and the Teamsters Union.

Q. And the same is true with respect to Local 896, isn't it? A. Yes.

Q. And the date on which this contract——

A. (Continuing): And the Distillery Workers were chartered on July 18th by the C.I.O. That is your so-called Brewery Workers Union.

Q. When was the Joint Local Executive Board formed after the issuance of these charters?

A. The Joint Local Executive Board is a part of the entire agreement, and it is not a formation, but if I recall correctly, its continuance is provided for, if I recall the [247] language of the agreement,

(Testimony of P. H. McCarthy.)

through the continuance of the Joint Local Executive Board.

Q. What was the date of that contract?

The Court: You have the two of them there now.

The Witness: One is the 28th, I believe, and the other is April 1st. [248]

* * *

WILLIAM S. SWEENEY

resumed the stand as a witness herein and, having been previously duly sworn, testified further as follows:

Direct Examination

(Continued)

By Mr. McCall:

Q. Do you have the returns, Mr. Sweeney?

A. I have (handing documents to counsel).

Mr. McCall: Just hand those to his Honor, please.

(The documents referred to were handed to the court.)

The Witness: I have one return non est.

The Court: That ought to be filed, too. He said he had one return non est.

Mr. McCall: Yes, sir. When you have marked those exhibits, let the court have them again, Mr. Clerk.

The Clerk: I marked Respondents' Exhibits A, B, and C, your Honor.

The Court: The returns are what I want.

(Testimony of William S. Sweeney.)

The Clerk: Oh, the returns.

The Court: That is what we are talking about. This return you have marked what, Mr. Clerk?

The Clerk: Those are filed in the case. [249]

The Court: Mark it as an exhibit.

The Clerk: Do you wish them marked?

The Court: Yes. What will they be?

The Clerk: They will be Respondents' Exhibits D, E, and F, for identification.

(The documents referred to were marked Respondents' Exhibits D, E, and F, respectively, for identification.)

The Court: On Respondents' Exhibit D, which is the first one, which purports to be a service on Thomas Vacca, president, and J. S. Allwine, secretary, of Local Union 893, there appears to be a note in handwriting, pencil handwriting.

Mr. Sweeney, will you look at that, please, and state when you first saw that appended on that instrument?

The Witness: I put it on, myself, on the date of the 2nd of June.

The Court: What were the circumstances of your placing that on there?

The Witness: The original document, or, the original summons did not contain the name of J. S. Allwine, but in making service at the brewery on Mr. Vacca, I was told that Mr. J. S. Allwine had been substituted or had taken the place of Mr.

(Testimony of William S. Sweeney.)

Elmer Schaffer, and that he was now the local secretary of that union.

The Court: Who told you that?

The Witness: Mr. Vacca. [249]

The Court: The court has reviewed the certificates.

Mr. McCall: That, I believe, is all the evidence that we have.

Q. (By the Court): When did you receive these papers for service, Mr. Sweeney?

A. Monday of this week; June the 2nd. I think, however, our office received them on Thursday of last week at about 4:30 p.m.

Q. You personally did not receive them until Monday of this week?

A. That's right; because another deputy was assigned to them, and I was away. When I returned, he was away, and they were substituted from his desk to mine.

Q. You know, however, that the instruments for service were left with the Marshal at what time?

A. 4:30 p.m., Thursday, May 29th.

Q. You did not receive them for service until the following Monday, June 2nd?

A. Myself. Another deputy had them that night, and went out and served the Los Angeles Brewing Company, but could not serve any others due to the fact that the Labor Temple had closed all their offices.

(Testimony of William S. Sweeney.)

The Court: That is all I care to examine him about. [250]

* * *

The Court: The objection is overruled as to the defendants concerning whom the service appears to have been effected.

Mr. McCarthy: For the record, will your Honor specify who the defendants are?

* * *

Local Union 893 of the International Brotherhood of——

Mr. McCarthy: 893 is sufficient to designate it for us, your Honor.

The Court: And Thomas Vacca, president, and J. S. [251] Allwine, secretary.

Mr. McCarthy: Of that local, or the Los Angeles branch?

The Court: Of Local Union 893.

Mr. McCarthy: When does your Honor care to hear us on the question of the motion to dismiss upon the ground that the court is without jurisdiction and upon the ground that the joinder of the parties at this time is a denial of due process in violation of the Fifth Amendment, and that the amended petition fails to state a claim upon which relief can be granted?

The Court: I will have to go to San Diego to hear a motion for a new trial tomorrow in a condemnation suit. I think we could hear you Saturday morning. [252]

* * *

Mr. McCall: May it please the Court: Inasmuch as service was had upon Mr. Allwine instead of Mr. Schaffer, I would like to move that the name "J. S. Allwine" be substituted for the name "Elmer Schaffer" in the caption of the case.

The Court: So ordered. [255]

* * *

(Whereupon, at 12:00 o'clock noon, Thursday, June 5, 1947, the hearing in the above-entitled matter was adjourned until Saturday, June 7, 1947, at 9:30 a.m.) [257]

Los Angeles, California

Saturday, June 7, 1947. 9:30 A.M.

(Argument of respective counsel.)

The Court: I am not so much interested in the disputes between counsel as I am as to what they mean.

I am satisfied, on reflection and a review of these authorities, that under the proper scope of the Fishgold and Trailmobile cases, and the reasoning and logic of the statute itself, there is jurisdiction in the court. It would be a waste of time to again reiterate what the court has said about its interpretation of Section 8 of the Selective Training and Service Act of 1940. The unions are now before the court and that is the picture that should have been before the court ab initio. I tried to make that clear to counsel, that at that time to issue an injunction against the brewery defendant would be, in my judgment, an idle act, because the motivating in-

strumentality was not the brewery, it was these labor union organizations. Now they are before the court, and I apprehend that they are here—apparently their telegram indicates that they are here—with the full recognition of the power of the court to dispose of these issues.

The objection to the jurisdiction of the court on behalf of the movant defendants is overruled and denied.

If the record is sufficiently clear, and on that I am not just satisfied, I am inclined not to issue a temporary restraining [259] order in the nature of a temporary injunction mandatory against the defendant Brewing Company and prohibitory against these labor union organizations.

I shall not do that now because of Mr. McCall's suggestions that he still feels that these interested groups will recognize the position of these veterans and give them a chance to get back to work, and demonstrate whether these conjectures and observations of Mr. McCarthy will ensue. It may be that between now and sometime later those matters can be settled definitely.

The court is prepared to make the finding which it made before, and which it still feels that the record to this date justifies, that these veterans were unlawfully discharged and that they are entitled to their positions in the defendant Brewing Company. Further than that at this time I think we will not go.

Mr. McCarthy: May it please the Court: I want

to be very sure of my record in this case, because your Honor realizes, as well as I do, the seriousness of the situation. I would like formally to ask leave, as I suggested beforehand I would do if your Honor ruled as your Honor has, for an opportunity to file answering affidavits on the order to show cause. I don't want a great deal of time, but I would like certainly until the early part of next week so that I can mail them out of San Francisco possibly on Wednesday or [260] Thursday.

The Court: I will not be here. You gentlemen know the court's assignment outside of the continental United States, which becomes effective on next Thursday.

Mr. McCarthy: In view of the fact your Honor is not issuing an order at this time, I felt that would give us an opportunity to at least complete our record. Also, I would ask leave before any order is issued to be permitted to cross-examine the witnesses with respect to the testimony that has already been given, and I would like your Honor to consider and rule on that portion of our objections which raises the denial of due process under the Fifth Amendment in this respect, that, as far as I know, the order bringing the organizations into this case does not set forth the terms upon which we are required to appear. The rules say anybody may be brought in at any time, but the court shall set forth the terms which it believes to be just. That has to do with our filing of answers, our examination of the record through witnesses, and things of that sort.

Now, your Honor must realize that I am not here because I like to cause difficulties, but I have a duty to my clients to perform, and I must insist that the record stand as it should. If we are going to be required to answer within the 20 days, we will answer. Your Honor having overruled our objections, we will file a formal answer and thereafter serve [261] a formal notice of trial. Just how your Honor wants to handle it, I don't know. I don't think it need be answered now, but I think the court should give some thought, when it has the opportunity, as to how it wants to handle that matter. And I want at this time to renew our request for an opportunity within which to file counter-affidavits in respect to the amended petition and the petition. [262]

* * *

The Court: Of course, if there is to be an injunction issued, Mr. McCall, you are aware of the necessities in the Ninth Circuit that there must be findings made.

Mr. McCall: Oh, yes.

The Court: I am not convinced that there is imminent necessity for the issuance of that injunction if this matter is approached properly by the interested parties. If it isn't, I propose to issue the injunction.

Mr. McCarthy: That, your Honor, I can only report to [263] those for whom I act. The decision there would be one of policy. My point concerns my duty simply as a lawyer. I would like my rec-

ord complete, and it was physically impossible for me to have completed it previously, and I would like sufficient time for me to complete it now, so that if your Honor carries out your present statement and it should be necessary so to do, why, at least I will have my record. As of today, I have nothing.

The Court: You probably could get a writ against the court, if the court tells you it will issue the injunction, which it will issue unless there is some different showing made before the court than is made at this time, and the court is not going to permit you to reopen this case and cross-examine the witnesses. That would be projecting or be attempting to project a labor issue into this case, when there isn't any, in my judgment.

Mr. McCarthy: That is a matter, your Honor, I will have to take up.

The Court: I think the situation is entirely changed now that the unions are before the court, and the processes of the court will be sufficient to reach all of the interested parties in the case. Heretofore the only party in the case was the innocent defendant in the case, and why a court of equity should reach out its arm to interfere with the business of the innocent defendant was beyond my power of comprehension. [264] Now the situation is changed. The unions are before the court, and they are the offending instrumentalities. That was the finding before, and it is the finding now. If you think you can get a writ to determine the question

of jurisdiction, and you claim it is a question of determination, I am confident you are in a good position in that respect.

Mr. McCarthy: At this stage of the proceedings I am not interested in any writ. I am interested in having on file the affidavit which will set forth the facts, many of which have been referred to here in argument, but which are not in the order to show cause before the court. I would like to have it there to complete the record. I cannot file it without your Honor's permission.

The Court: The difficulty of that is this, that you know the court's commitments as to leaving here and being absent for approximately three weeks. I told you definitely that was the assignment from the Senior Judge of the Circuit Court of Appeals on a three-judge case in Hawaii. In order to keep that appointment I shall have to leave here on Thursday, and I will not be back until—I believe the return voyage is on July 3rd, which will bring me back here about July 10th or 11th. The matter will just hang in the balance until that time, unless there is something done in the meantime.

I am hopeful, in view of Mr. McCall's very persuasive [265] suggestion that he thought this matter would be adjusted by this finding, that you will do that, and I want to permit you to do that, if you can do it. But there ought to be something done in the way of movement here. Either get a writ against the court, and if the court hasn't any juris-

diction the Circuit Court of Appeals can issue its writ to prohibit any injunction, or——

Mr. McCarthy: I have no record, your Honor, on which I could apply for a writ unless I am permitted to file affidavits. Unless I do that, I won't have a record.

The Court: I am inclined to give you a day or two to file affidavits, but I am not going to give you any extended time.

Mr. McCarthy: I don't want any extended time, your Honor.

The Court: When can you file your affidavits?

Mr. McCarthy: I can file them on Tuesday. The situation is this: I will be in my office Monday, and I can bring them with me to San Diego and can file them with the Clerk in San Diego, and transmit a copy by air mail special delivery, so that it will reach here on Tuesday.

The Court: If you want to file any counter-affidavit, you can file it provided it is here by Tuesday morning.

Mr. McCarthy: Thank you, your Honor.

The Court: The court will not, until that affidavit is [266] here, issue any injunction. Upon the reading of that affidavit, and if the petitioners make a further motion and the affidavit does not remove from its mind the conclusion which the court has indicated, upon an application by the petitioners I shall issue an injunction.

Mr. McCarthy: Thank you, your Honor.

The Court: You had better prepare a written

judgment of dismissal on this question of jurisdiction, Mr. McCall, so that the record will be complete on it.

Mr. McCall: You mean an order overruling——

The Court: Overruling the plea on the question of jurisdiction.

Mr. McCall: Yes. [267]

Los Angeles, California

Wednesday, September 3, 1947. 10:00 A.M.

The Clerk: No. 6322-M Civil, Fred Elio Iob, et al., vs. Los Angeles Brewing Company, Inc., et al., for setting for trial.

The Court: I thought that case was disposed of and everybody back at work and everybody satisfied.

Mr. McRoberts: I am afraid that we thought your Honor might become lonesome if we were not here for some length of time in some phase of the case. It was my suggestion that we do as we did in the Stewart McKee case, which is a matter pending before Judge Beaumont, and there is a case before Judge Weinberger, which is under submission.

* * *

The Court: I am of the same opinion as I was at the conclusion of the hearing, gentlemen. I don't believe this case is an injunction case. I don't believe it is a veterans' case at all. I think it is a labor case of the type that will not be adjusted nor

settled by any decision in this case, excepting in a way that will be destructive and detrimental to all parties concerned.

I don't think that there is any change in the court's mind since the hearing on that phase of it.

I do feel that on the phase of the right to compensation, there could be that issue there, and I think your suggestion is very pertinent in that regard, that you gentlemen can agree, assuming that the veterans would be entitled to be restored, upon what would be the compensation or the loss of wages for the period that is applicable in this case. If the defendant will deposit a sufficient amount of money to insure any recovery that is to be made in that regard and deposit it with the registry, under a stipulation, I think then we can await the decision in the other case.

Mr. McRoberts: Does your Honor care to make a minute order to that effect?

The Court: Yes, that is what I am trying to do, and to get it for the reporter.

It is ordered that the injunction will be denied, and that upon the deposit of the Los Angeles Brewing Company, Inc., [270] the respondent in the case, of an amount sufficient to liquidate and discharge any unpaid wage claim that may be hereafter determined, further proceedings in this case will be suspended until November 4th—that is the monthly calendar day in November—and at that time, if there is anything left to try, we will try it.

Now, you gentlemen should be able to stipulate

as to the amount. It is a mere matter of mathematics, I think.

Mr. McRoberts: Thank you, your Honor.

The Court: On the filing of such stipulation, the amount will be deposited in the registry.

The Clerk: To be called for setting on that day, your Honor?

The Court: Yes, to be called on that day for setting, or to be disposed of. [271]

* * *

Los Angeles, California

Monday, December 20, 1948. 10:00 A.M.

The Court: Call the calendar.

The Clerk: No. 6322-M Civil, Fred Elio Iob, et al., vs. Los Angeles Brewing Company, Inc., et al., resetting for trial or disposition.

The Court: Gentlemen, I have read the motion or application on the part of the petitioners for leave to propound interrogatories. I think the procedure there is somewhat unusual, but regardless of that aspect of it, I don't see anything in the answers that would modify the view of this court as already expressed.

I have been in Arizona for a week trying a case there, and I haven't been able to put the views of the court into a short memorandum, which I shall do this week and file at some time during the week. In order for the record to be clear, we ought to specify a day when the memorandum will be filed.

I think I can do it by Thursday of this week, so we will continue this matter until 2:00 o'clock on

Thursday afternoon, and in the meantime I will prepare a memorandum to decide the issues. I am still of the same view as I was originally. There has been nothing in our reading or in anything that has been submitted which modifies the view of the court as tentatively expressed throughout the proceedings.

With regard to the other case in this court, has that [274] been decided—the San Diego case?

Mr. McCall: No, your Honor.

Mr. Alsup: No, your Honor.

Mr. McCall: That is to be submitted this afternoon, as I understand it, at 2:00 o'clock.

The Court: I will formulate the court's views in a memorandum for the preparation of findings of fact and conclusions of law. I shall do that on or before Thursday of this week, and I will continue this matter until December 23rd at 2:00 o'clock in the afternoon.

Mr. McCarthy: Will it be necessary for myself to come down from San Francisco at that time?

The Court: I don't think so, Mr. McCarthy. I don't think there is anything that requires that. Findings, of course, will have to be prepared.

Mr. McCarthy: That is another matter. There will be no other procedure, other than the filing of the court's memorandum?

The Court: That is right. I am glad to see you here.

Mr. McCarthy: Thank you, your Honor. [275]

Los Angeles, California

Thursday, December 23, 1948. 2:00 P.M.

The Court: Call the case, Mr. Clerk.

The Clerk: No. 6322-M Civil, Fred Elio Iob, et al., vs. Los Angeles Brewing Company, Inc., et al., resetting for trial or disposition.

The Court: Anything further, gentlemen?

Mr. McCall: Nothing further, your Honor.

Mr. Alsup: Nothing further for the respondent.

The Court: I will read a memorandum of decision, gentlemen. I may add to it a little, but it contains, I think, in a complete manner the conclusions of the court on the matter. [277]

* * *

Accordingly, gentlemen, the findings of fact, conclusions of law, and judgment of dismissal for the respondent company is ordered.

You will prepare those, will you, counsel, and serve them? [285]

* * *

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 17th day of May, A.D., 1949.

/s/ MARIE G. ZELLNER,
Official Reporter.

[Endorsed]: No. 12247. United States Court of Appeals for the Ninth Circuit. Fred Elia Iob, Samuel M. Dobbs and Waldemar F. Ullrich, Appellants, vs. Los Angeles Brewing Co., Inc., Joint Local Executive Board of California, Bottlers Local Union No. 896, Brewers, Maltsters & Yeast Workers Local Union No. 893 of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, Walter Eckberg, Anthony Zeigler, Thomas Vacca and J. S. Allwine, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 28, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

FRED ELIO IOB, et al.,

Petitioners-Appellants,

vs.

LOS ANGELES BREWING COMPANY, INC.,
a Corporation, et al.,

Respondents-Appellees.

MOTION FOR EXTENSION OF TIME

The Appellants-Petitioners Fred Elia Iob, Samuel M. Dobbs, and Waldemar F. Ullrich respectfully move the Court for an extension of time until May 30, 1949, within which to file the record, docket the case, and otherwise perfect the appeal to this Court from the United States District Court for the Southern District of California.

The ground of Motion is that said appeal cannot be perfected and docketed by April 28, 1949, the date allowed by Order of the District Court, for the reasons set forth in the Affidavit of James C. R. McCall, Jr., hereto attached.

JAMES M. CARTER,

United States Attorney.

CLYDE C. DOWNING,

Assistant U. S. Attorney,

Chief of Civil Division.

/s/ JAMES C. R. McCALL, JR.,

Assistant U. S. Attorney, Attorneys for Appellants-
Petitioners.

[Title of Court of Appeals and Cause.]

AFFIDAVIT OF JAMES C. R. McCALL, JR.,
FOR EXTENSION OF TIME TO PERFECT
AND DOCKET APPEAL

United States of America,
Southern District of California—ss.

James C. R. McCall, Jr., being first duly sworn,
deposes and says:

That in this case, which is No. 6322-M Civil in the United States District Court for the Southern District of California, styled Fred Elia Iob, et al., Petitioners, vs. Los Angeles Brewing Company, Inc., a Corporation, et al., Respondents, final judgment was entered on December 31, 1948, and Notice of Appeal therefrom by the Appellants-Petitioners was filed on January 28, 1949.

Thereafter, on March 8, 1949, the time for perfecting and docketing the appeal was extended by Order of the District Court to April 28, 1949.

That it is impossible to perfect and docket said appeal by April 28, 1949, and an extension of time therefor to May 30, 1949, is needed.

That this is a suit in which three veterans of the Armed forces of the United States were discharged during their re-employment year for their lack of membership in a labor union with which their employer had entered into a closed-shop contract after they left their positions of employment to enter upon service in said Armed forces of the United States, and before the termination of

their statutory year of re-employment, following their respective returns to said positions. Said veterans were not members, nor were they required to belong to said labor union as a condition of employment prior to their military service. Claiming that they were discharged within the employment year in violation of Section 8 of the Selective Training & Service Act of 1940, as amended—(50 U.S.C.A. Sec. 308)—they brought this suit in said District Court; and said suit was dismissed by the judgment aforesaid, of December 31, 1948, on the ground that they, as veterans, were bound by the labor union membership requirement of the closed-shop contract entered into during their military absence and within one year after their return.

That the United States Attorney for the Southern District of California, through affiant who is an Assistant United States Attorney for said District, represented the Appellants-Petitioners in the trial of said case, as required by Title 50, United States Code, App. Sec. 308(e); and this appeal is being prosecuted for said veterans by said United States Attorney upon authorization of the Attorney General of the United States, the Department of Justice bearing the expense of the appeal under the provisions of said Selective Training & Service Act, aforesaid. That the Attorney General authorized the filing of Notice of Appeal, but did not authorize the United States Attorney to perfect said appeal until April 11, 1949, when a letter granting the taking of such appeal at the expense of the De-

partment of Justice, dated April 6, 1949, was received by this affiant. One probable reason for the delay in authorizing the perfecting of the appeal was that there is pending in the United States Supreme Court a case on appeal from this Court—(United States Court of Appeals for the Ninth Circuit)—entitled *Aeronautical Industrial District Lodge 727 vs. James L. Campbell et al.*, No. 3333 in the Supreme Court, which case involves the legal issue of whether collective bargaining representatives may interfere with, or materially alter the terms and conditions of employment of a returned veteran during his re-employment year, and the opinion on that appeal could prove determinative of the legal issue in this case. Said case of *Aeronautical Industrial District Lodge 727 vs. James L. Campbell et al.*, No. 3333 Supreme Court, was argued in the United States Supreme Court on or about January 31, 1949, and has not yet been decided although a decision thereon is momentarily expected by the parties involved. The Attorney General probably wished to await the decision in that case before authorizing, or declining to authorize, the perfecting of the appeal in this case—(*Iob v. Los Angeles Brewing Company, Inc.*) at the expense of the Department of Justice.

Affiant is advised by the Court Reporter that it will be impossible to make a transcript of record and file the same before April 28, 1949, and the completion of the record on that date will not permit the Appellants-Petitioners to designate the record on

appeal, and file the record in this court within the time provided for in the extension granted by the District Court.

That an extension of time to May 30, 1949, to file the record, docket the case, and perfect the appeal is, therefore, urgently needed on behalf of said Appellants-Petitioners.

That some of the interested parties in this appeal are represented by out-of-town counsel, and it is impractical to give the usual notice of this application for extension of time.

/s/ JAMES C. R. McCALL, JR.,
Assistant U. S. Attorney.

Subscribed and Sworn to before me this 18th day of April, 1949.

EDMUND L. SMITH,
Clerk, United States District Court, Southern District of California.

[Seal] By /s/ WM. A. WHITE,
Deputy.

[Title of Court of Appeals and Cause.]

ORDER FOR EXTENSION OF TIME FOR
APPELLANTS TO PERFECT APPEAL

For good cause shown, It Is

Ordered that the time within which the Record on Appeal may be filed, the case docketed, and the

appeal otherwise perfected to this Court, be, and is hereby extended to May 30, 1949.

Dated: This 20th day of April, 1949.

/s/ ALBERT LEE STEPHENS,

/s/ HOMER T. BONE,

/s /WM. E. ORR,

Judges of the United States Court of Appeals for
the Ninth Circuit.

[Endorsed]: Filed April 20, 1949.

[Endorsed]: Refiled May 28, 1949.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON THE
APPEAL

Come now the Appellants Fred Elia Iob, Samuel M. Dobbs, and Waldemar F. Ullrich and state, pursuant to Rule 19(6) of this Court, that the points on which they intend to rely on the appeal are:

I.

The discharges of the appellants, on demand of the appellee unions and union officials, were unauthorized and unjustified by the terms of the Collective Bargaining Agreement dated July 28, 1946, and constitute a breach of the working conditions therein set forth; and the District Court misconstrued and misapplied said Collective Bargaining Agreement in holding that it required the appellants' discharges because of their non-membership

in Local Union Nos. 896 and 893 of the International Brotherhood of Teamsters, etc.

II.

The appellants' discharges were "without cause" within the meaning of Section 8 of the Selective Training Service Act; and constituted violations of said Act; and the District Court erred in failing so to hold.

III.

The District Court erred in refusing to issue mandatory and protective injunctions to restore the appellant veterans to their positions of employment.

IV.

The District Court erred in failing to require the respondent Brewing Company to compensate them for their loss of wages suffered by reason of said discharges and in failing to exact similar compensation for them from the respondent labor unions and officials thereof.

V.

Appropriate relief for the appellant veterans should be ordered by this Court.

JAMES M. CARTER,

United States Attorney.

CLYDE C. DOWNING and

JAMES C. R. McCALL,

Assistant U. S. Attorneys.

/s/ JAMES C. R. McCALL,

Attorneys for Appellants-
Petitioners.

[Endorsed]: Filed May 28, 1949.

[Title of Court of Appeals and Cause.]

APPELLANTS' DESIGNATION OF THE
PARTS OF THE RECORD TO BE PRINTED

Come now the Appellants Fred Elia Iob, Samuel M. Dobbs, and Waldemar F. Ullrich and, pursuant to Rule 19(6) of this Court, designate for printing the following portions of the Clerks and Reporters Transcripts, to wit:

1. The following parts of the Clerk's Transcript:

Petition for Enforcing of Re-employment Rights, pages 1-9.

Answer of Los Angeles Brewing Company, pages 10-14.

Exhibit A thereto, pages 14-36.

Minute Entries, pages 38-40.

Motion for New Trial, pages 42-43.

Minute Entry May 19, 1947, page 46.

Amended Petition, pages 47-57.

Order to Show Cause, page 58.

Minute Entry June 5, 1947, page 63.

Minute Entry June 7, 1947, pages 92-93.

Answer of Joint Local Executive Board, etc., pages 224-244.

Answer of Los Angeles Brewing Company, pages 360-374.

Exhibit B thereto, page 398.

Minute Entry September 3, 1947, page 425.

Stipulation as to Bond, page 426.

Petitioners' Request for Admissions, pages 428-431.

Schedules 1, 2, 3 and 4, and Exhibit A thereto, pages 432-440.

Reply of Joint Local Executive Board to Request for Admission, pages 442-446.

Reply of Los Angeles Brewing Company, pages 446A-446F.

Minute Entry December 23, 1947, page 447.

Memorandum of Decision, pages 448-454.

Findings of Fact and Conclusions of Law, pages 455-464.

Judgment December 31, 1948, page 465.

Notice of Appeal, page 467.

Order Extending Time, page 469.

Designation of Record on Appeal, page 470.

Certificate of Clerk, page 471.

2. The following parts of the Reporter's Transcript of Proceedings:

From Page 1, Line 1, through Page 63, Line 9.

From Page 79, Line 14, through Page 80, Line 10.

From Page 88, Line 10, through Page 143, Line 6.

Page 155, Line 1.

From Page 160, Line 4, through Page 164, Line 25.

From Page 171, Line 6, through Page 176, Line 17.

From Page 179, Line 21, through Page 184, Line 7.

Page 190, Lines 1 through 12.

From Page 193, through Lines 1 to 6.

Page 257, Line 17 through 19.

From Page 259, Line 1, through Page 260, Line 16.

From Page 263, Line 17, through Page 267, Line 13.

Page 269, Line 1, through Line 13.

From Page 270, Line 1, through Page 271, Line 15.

From Page 274, Line 1, through Page 275, Line 20.

Page 777, Line 1 through 12.

Page 285, Line 10 through 14.

3. The appellants' points on which they intend to reply and this designation of record to be printed.

JAMES M. CARTER,

United States Attorney.

CLYDE C. DOWNING and

JAMES C. R. McCALL,

Assistant U. S. Attorneys.

/s/ JAMES C. R. McCALL,

Attorneys for Appellants-
Petitioners.

[Endorsed]: Filed May 28, 1949.

[Title of Court of Appeals and Cause.]

APPELLEES' DESIGNATION OF THE
PARTS OF THE RECORD TO BE PRINTED

Comes Now appellees, The Joint Local Executive Board of California, Bottlers' Local Union No. 896 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Anton Ziegler, Brewers, Maltsters and Yeast Workers Local Union No. 896 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Thomas Vacca and J. S. Allwine and, pursuant to Rule 19(6) of this Court, designates for printing the following portions of the Clerks and Reporters Transcripts, to wit:

1. The following parts of the Clerk's Transcript:

Motion to Dismiss, Vacate and Set Aside Alias Summons, Amended Petition for Enforcement of Veteran Employment Rights, Order to Show Cause, and Affidavits and Memorandum of Points and Authorities in Support of Motion, pages 65-71.

Motion to Dismiss, pages 72-73.

Affidavit of James M. McRoberts, pages 74-91.

2. The following Parts of the Reporter's Transcript of Proceedings:

Page 193, Line 8, through Page 194, Line 3.

Page 199, Line 18, through Page 200, Line 6.

Page 227, Line 24, through Page 228, Line 16.

Page 246, Line 8, through Page 248, Line 6.

Page 249, Line 8, through Page 250, Line 23.

Page 251, Line 6, through Line 9.

Page 251, Line 22, through Page 252, Line 13.

Page 255, Line 3, through Page 255, Line 7.

Page 260, Line 17, through Page 262, Line 7.

Page 266, Line 22, through Line 24.

Page 267, Line 7, through Line 13.

Dated: June 3, 1949.

/s/ P. H. McCARTHY, JR.,

Attorney for The Joint Local Executive Board, Bottlers' Local Union No. 896 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Anton Ziegler, Brewers, Maltsters & Yeast Workers Local Union No. 896 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Thomas Vacca and J. S. Allwine, Appellees.

[Endorsed]: Filed June 6, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION BY APPELLEE OF ADDITIONAL PORTIONS TO RECORD TO BE PRINTED

Appellee Los Angeles Brewing Co. (now Main Street Corporation and incorrectly designated in the

pleadings herein as Los Angeles Brewing Company, Inc.) designates for printing pursuant to Rule 19(6) of this Court the following additional matters not designated by appellants:

1. The following portions of the Reporter's Transcript of Proceedings:

From page 80, line 12, through page 88, line 7.

From page 143, line 7, through page 145, line 23.

From page 177, line 12, through page 179, line 20.

From page 184, line 14, through page 185, line 10.

From page 188, line 12, through page 188, line 19.

2. This designation.

Dated June 4, 1949.

O'MELVENY & MYERS,
W. B. CARMAN, JR.,
WILLIAM W. ALSUP.

By /s/ WILLIAM W. ALSUP,
Attorneys for Appellee.

[Endorsed]: Filed June 6, 1949.

No. 12247

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED ELIA IOB, SAMUEL M. DOBBS and WALDEMAR F.
ULLRICH,

Appellants,

vs.

LOS ANGELES BREWING Co., INC., a corporation, *et al.*,
Appellees.

BRIEF OF APPELLEE LOS ANGELES BREWING CO.

O'MELVENY & MYERS,
W. B. CARMAN, JR., and
W. W. ALSUP,

900 Title Insurance Building, Los Angeles 13,
Attorneys for Appellee Los Angeles Brewing Co.

FILED

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PAUL P. O'BRIEN,

CLERK

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No. 12247

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED ELIA IOB, SAMUEL M. DOBBS and WALDEMAR F.
ULLRICH,

Appellants,

vs.

LOS ANGELES BREWING Co., INC., a corporation, *et al.*,
Respondents.

BRIEF OF APPELLEE LOS ANGELES BREWING CO.

Statement of Facts.

At the time appellants left their employment for military service,* the collective bargaining agent representing the brewers and bottlers employed by respondent Los Angeles Brewing Co.** was the International Union of United

*Appellants Iob, Dobbs, and Ullrich were first employed by The Company in March, 1943, July, 1937, and February, 1937, respectively. They left their positions for military service on February 24, 1945, January 17, 1942, and May 9, 1942, respectively [Tr. 208-209].

**The petition incorrectly designated respondent as Los Angeles Brewing Company, Inc. At that time respondent's correct name was Los Angeles Brewing Co. In June, 1948, respondent sold its brewing business to Los Angeles Brewing Company (a new corporation). Respondent's correct name is now Main Street Corporation. To avoid confusion the respondent will continue to be referred to herein as Los Angeles Brewing Co. or simply as respondent company.

Brewery, Flour, Cereal and Soft Drink Workers of America [Tr. 209]. Until 1941 this Union was an affiliate of the American Federation of Labor. From 1941 until sometime prior to July, 1946, it operated as an independent Union [Tr. 209]. Prior to their military service the appellants were required to be and were members of local Unions of the International Union as a condition of their employment [Tr. 209].

In April, 1946, the general executive board of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers determined to hold and did hold a national referendum of its members to determine whether it should affiliate with the Congress of Industrial Organizations. By a small majority nationally the members of the Union voted in favor of affiliation with the Congress of Industrial Organizations [Tr. 320-321]. This proposed action was not popular in California, however, for in this state approximately 90% of the members of the Union had voted against affiliation with the Congress of Industrial Organizations [Tr. 292, 320-321]. The Union members in California instructed the officers of their locals to make what arrangements they could to get back into the ranks of the American Federation of Labor [Tr. 321]. Prior to July 28, 1946, more than 90% of the respondent company's employees signed authorization cards designating locals (hereinafter referred to as "teamster locals") affiliated with the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America as their agent for purposes of collective bargaining [Tr.

210, 316-317]. These cards were exhibited to and checked by the representatives of respondent company, and the teamster locals thereupon demanded that the company recognize them as the collective bargaining agent of the employees of the company and enter into a collective bargaining contract with them [Tr. 316-317]. The respondent company did recognize the teamster locals as the collective bargaining agent for its employees and on July 28, 1946, made and entered into a contract with them which contract, among other things, provided for a closed shop [Tr. 210-211].

Appellants Dobbs and Ullrich had returned to their jobs from their honorable military service on January 2, 1946, and April 29, 1946, respectively—both prior to the making of the closed shop contract of July 28, 1946. Appellant Iob returned to his job from his honorable military service on September 9, 1946 [Tr. 209]. Although the Union representatives solicited and importuned appellants to become members of the appropriate teamster local, which membership was required by the contract as a condition of continued employment, all of the appellants refused to become members [Tr. 215]. Upon such continued refusal and upon demand by the representative of the contracting labor organizations, respondent company discharged each of appellants [Tr. 215].* The respondent company was threatened with strikes and economic pressure if the demands to discharge appellants were not complied with [Tr. 215-216].

*Appellant Iob was discharged on September 17, 1946, and, after a brief period of re-employment, was again discharged on November 25, 1946. Appellants Dobbs and Ullrich were discharged on October 5, 1946 [Tr. 215].

ARGUMENT.

Introductory.

Appellants take issue with the finding [Tr. 210] of the District Court that the teamster locals represented a majority of the employees of the respondent company at the time the closed shop contract was entered into, and they ask this Court to take judicial notice of a decision of the National Labor Relations Board in *Acme Brewing Co., et al.*, 72 N. L. R. B. 1005,* which decision, the appellants incorrectly assert, holds, contrary to the finding of the District Court, that on July 28, 1946, the teamsters locals did not represent a majority of the employees of respondent company. The National Labor Relations Board did not

*Inasmuch as the appellants are now arguing the case on a theory of unfair labor practices, it would seem logical for this court to take judicial notice of the fact that unfair labor practice charges (Case No. 21-C-2871) were filed with the 21st Regional Office of the National Labor Relations Board against respondent company alleging that the same discharges of appellants which are the subject of the pending action (as well as discharges of other employees) were unfair labor practices in violation of Section 8(3) of the National Labor Relations Act and that the contract of July 28, 1946, was invalid under the National Labor Relations Act. (29 U. S. C. A. Sec. 158.) These charges were dismissed by the 21st Regional Office of the National Labor Relations Board after an investigation, and an appeal was taken therefrom to the General Counsel of the National Labor Relations Board, who affirmed the action of the 21st Regional Office of the Board. Prior to the signing of the findings of fact in the pending case these facts were brought to the attention of the District Judge by oral stipulation. We respectfully request that this Honorable Court take judicial notice of the facts recited above, and that we be given leave to submit certified copies of Charge No. 21-C-2871, as amended, and of the letters of the 21st Regional Office and of the General Counsel of the National Labor Relations Board dismissing the charge.

in the cited case, or in any other case, hold that the contract was invalid or that the teamster locals did not represent a majority of the employees of respondent company at the time said contract was entered into. In the cited case the National Labor Relations Board did hold on February 28, 1947, that the contract was not a bar to the holding of an election by the National Labor Relations Board to determine which union the employees wished to have represent them in the future as their collective bargaining agent. Patently, despite the assertion of appellants, this was not a holding that the contract was invalid or that on July 28, 1946, the teamster locals did not represent a majority of the employees of respondent company.

We propose initially to discuss the case on appellants' theory, and to show that the contract was perfectly valid under the National Labor Relations Act (29 U. S. C. A. 151-166), and that the discharges of appellants were not a violation of appellants' rights under the Selective Service and Training Act of 1940, as amended. Finally we shall discuss the question whether what appellants term the "main issue" (and the only issue argued in their brief) is properly before this Court.

I.

The Contract Was a Valid Closed Shop Contract and Appellants Were Properly Discharged for Refusing to Comply With It.

- A. If the Union Presents to the Employer Satisfactory Evidence That It Represents a Majority of His Employees It Is Entitled to Recognition as the Collective Bargaining Agent. It Is Unnecessary That an Election Be Held or That the National Labor Relations Board Formally Certify the Union Before the Employer Can Bargain With the Union.

The uncontradicted evidence shows that the teamster locals had been designated as the collective bargaining agent by a majority of the employees of respondent company prior to the making of the contract of July 28, 1946 [Tr. 210, 291-292, 316]. More than 90% of the employees had signed cards designating the teamsters locals as bargaining agent, and these cards were exhibited to the representatives of respondent company as a basis for demanding the contract [Tr. 316]. In these circumstances it was proper for the company to recognize and bargain with the teamster locals.

It is true that the teamster locals had not been formally certified by the National Labor Relations Board and had not won an election, but neither of these conditions is a prerequisite to recognition or collective bargaining.

N. L. R. B. v. Remington Rand, Inc. (2d Cir., 1938), 94 F. 2d 862, 868;

N. L. R. B. v. Federbush Co. (2d Cir., 1941), 121 F. 2d 954;

N. L. R. B. v. Dahlstrom Metallic Door Co. (2d Cir., 1940), 112 F. 2d 756.

In the *Dahlstrom Metallic Door Co.* case, the Court of Appeals for the Second Circuit affirmed a finding of the National Labor Relations Board that the employer had unlawfully refused to bargain with the Union. The Court rejected the employers' contention that bargaining was not required in the absence of a certification by the National Labor Relations Board. The Court said (p. 757):

"The evidence also supports the findings that respondent unlawfully refused to bargain collectively. The contention that bargaining was not mandatory until the Board has accredited Local No. 307 as bargaining agent is frivolous. An employer is under a duty to bargain as soon as the union representative presents convincing evidence of majority support. *National Labor Relations Board v. Remington Rand, Inc.*, 2 Cir., 94 F. 2d 862, 868, certiorari denied 304 U. S. 576, 585, 58 S. Ct. 1046, 82 L. Ed. 1540. We do not mean that respondent had to bargain with any one claiming to represent a majority but adequate proof tendered by the claimant could not in good faith be ignored. The union offered to submit the signed membership cards, but this offer was not accepted. Respondent 'made no effort to learn the facts and took the chance of what they might be.' *National Labor Relations Board v. Remington Rand, Inc.*, *supra*, 94 F. 2d at page 869."

Similarly in *Matter of L. B. Hartz Stores* (1946), 71 N. L. R. B. 848, the trial examiner, whose decision was affirmed by the National Labor Relations Board, stated (p. 871):

"The Act is clear in intent, and it has been too well-established to require extended discussion, that election and certification proceedings are not the only method of determining majority representation, and

that an employer may not require certification as a condition precedent to bargaining where the employer entertains no real doubt as to the Union's majority, or where reasonable proof is available and the employer makes no effort to ascertain whether the Union has a majority."

In the light of this long-standing rule, and in view of the evidence presented to the employer that the Union did represent a majority of the employees, we respectfully submit that the respondent company acted properly in recognizing and dealing with the teamster locals as the collective bargaining agent of its employees.

B, A Valid Collective Bargaining Contract Does Not Prevent the National Labor Relations Board From Ordering an Election to Be Held. A Holding That a Contract Is Not a Bar to An Election Is Not a Holding That the Contract Is Invalid.

Appellants assert that the National Labor Relations Board held in February 1947, on the basis of a petition filed in August 1946, that the contract pursuant to which appellants were discharged was not a bar to the holding of an election (Op. Br. pp. 11-12). They then assert that under all decisions of the National Labor Relations Board a contract made with a union which represents a majority of the employees is a bar to election proceedings. They conclude that since this contract was held by the National Labor Relations Board not to be a bar to an election it was therefore an invalid contract and the discharges of appellants were unlawful. Appellants' premise is fallacious and their conclusion a *non sequitur*.

The *Texas Co.* case (64 N. L. R. B. 653) cited by appellants (Op. Br. p. 11) is not authority for their premise

that a valid collective bargaining contract is a bar to an election. There the Board held that even assuming a "binding contract" was made on June 11, 1945 between the company and the Union, nevertheless such contract was not a bar to a current determination of representatives inasmuch as the rival union had filed its petition for an election with the Board prior to the effective date of the alleged contract.

The National Labor Relations Board has a rule in representation cases that an oral or unsigned contract, though perfectly valid, is not a bar to an election where the rival union files a representation petition.

Association of Motion Picture Producers, 25 L. R. R. M. 1226, 87 N. L. R. B. No. 81 (1950);

International Brotherhood of Teamsters, etc. (1950), 25 L. R. R. M. 1202, 87 N. L. R. B. No. 30.

And yet the National Labor Relations Board also holds that such oral or unsigned contract is a defense against a charge of unfair labor practices.

International Brotherhood of Teamsters, etc. (1949), 25 L. R. R. M. 1202, 1204, 87 N. L. R. B. No. 30.

The National Labor Relations Act empowered the Board to order an election to be held at any time when it determined that a question affecting commerce had arisen concerning the representation of employees. The existence or non-existence of a contract has never been deemed a

limitation on that power. The Act provided at the time in question:

“(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.” (29 U. S. C. A., Sec. 159.)

It is true that the Board often holds that an existing contract will be deemed by it to be a bar to an election for a reasonable time—this for the purpose of promoting stability in labor relations. But there is no requirement that the Board so hold, and there is a plethora of cases wherein it has ordered an election to be held despite the existence of a valid collective bargaining contract.

That a contract is not rendered invalid simply because the Board orders an election to be held follows from the decision of the Supreme Court in *Colgate-Palmolive-Peet Co. v. N. L. R. B.* (1949), 338 U. S., 70 S. Ct. 166. In that case an election was ordered by the Board, and yet discharges made just prior to the election were held by the Supreme Court to be lawful, because made pursuant to the provisions of a closed shop contract.

C. Discharges Made Pursuant to a Closed Shop Contract Are Lawful Despite the Fact That a Question Concerning Representation Exists at the Time of Such Discharges.

On July 28, 1946, the closed shop contract was made with the teamster locals which had presented evidence to the employer that they were the designated representative of the majority of his employees [Tr. 210]. In August 1946 the International Union of United Brewery, Flour, Cereal and Soft Drink Workers (C. I. O.) filed a representation petition with the National Labor Relations Board requesting an election (Op. Br. p. 12). Appellants Dobbs and Ullrich continued to work after July 28, 1946 and until October 5, 1946 despite their refusal to become members of the Union as required by the contract. Appellant Iob was returned to his employment despite his refusal to become a member of the Union as required by the contract. All were solicited and importuned to join the contracting union and all refused. All were discharged for such refusal upon demand of the contracting union [Tr. 215]. In February, 1947, long after the discharges, the National Labor Relations Board ordered an election to be held (Op. Br. p. 11).

It is in the background of the foregoing facts that appellants request this court to reverse the District Court and declare that their discharges at the demand of the contracting union, which threatened strikes and economic pressure if the demands were refused [Tr. 216], were nevertheless discharges "without cause" under the Selective Training and Service Act (50 U. S. C. A. App., Sec. 308(e)).

Contrary to the contentions of appellants, however, the existence of a question concerning representation at the

time of a discharge pursuant to a closed shop contract does not render such discharge unlawful.

Colgate-Palmolive-Peet Company v. N. L. R. B. (1949), 338 U. S., 70 S. Ct. 166.

In the *Colgate-Palmolive-Peet Co.* case a number of employees were discharged pursuant to a closed shop contract with the C. I. O. union, despite the fact that at the time of such discharges a representation petition filed by the rival A. F. L. union was pending before the National Labor Relations Board, which had already held a hearing upon the A. F. L. union's petition. Thereafter the National Labor Relations Board conducted an election, which was won by the C. I. O. union. Later the Board set the election aside on the ground that the discharges of employees made at the request of the C. I. O. union had wrongfully influenced the vote at the election. Yet the Supreme Court declared that these discharges were lawful.

The case of *Ellis Canning Company* (1948), 76 N. L. R. B. 99 is also in point. Here the company made a closed shop contract with the A. F. L. union in August 1945. Prior to April 1946 by oral understanding between the company and the union, the union did not insist on enforcement of the closed shop provisions. In January 1946, the C. I. O. union filed a representation petition with the National Labor Relations Board, and in March 1946 hearings were held on the petition of the C. I. O. union. In April 1946, the A. F. L. union insisted on enforcement of the closed shop provisions of its contract and on April 10, 1946, a number of employees were accordingly discharged for failing to be members of that union. On April 16, 1946, the National Labor Relations Board ordered an election to be held.

Following the discharges of the employees on April 10, 1946, the C.I.O. Union filed unfair labor practice charges against the employer in which it contended that the revival of the closed shop provision of the August, 1945, contract, and the discharge of the employees pursuant thereto in the face of the pending representation proceedings, was a violation of the National Labor Relations Act. The National Labor Relations Board held otherwise, and affirmed the decision of the trial examiner, whose opinion states (pp. 113-114):

“Had the respondent in January, 1946, after the petition had been filed by the CIO, fired CIO members on request of the AFL, or in April on reopening the plant had respondent refused reemployment to CIO members who were willing to join the AFL, the position of counsel for the Board would be more tenable. These facts are not before us, however. No one was discharged for joining the CIO in January, 1946, and in April every employee on the February pay roll was recalled to work and every one who reported was requested to join the AFL regardless of their activities on behalf of the CIO. There is no showing that all employees on the February pay roll would not have been reemployed on April 10 had they joined the AFL, and no showing that after joining the AFL they could not have affiliated with, campaigned for, and voted for the CIO without hindrance from respondent. Without such proof the *Rutland Court* line of decisions is inapplicable herein.”

In the instant case it is also worthy of note that there is no evidence that appellants could not have joined the teamster locals as they were requested to do, and yet remained affiliated with their C.I.O. union. In these circumstances appellants' assertion that they were confronted with a “Hobson's choice” is a euphemistic but inaccurate descriptive term.

There are, of course, numerous cases in which the National Labor Relations Board has held that the employer may discharge, refuse to reinstate, or refuse to employ anyone who does not have membership in the contracting union which has a closed shop contract with the employer.

Aeolian-American Corporation (1938), 8 N. L. R. B. 1043;

Mead Corporation (1943), 52 N. L. R. B. 1361;

General Furniture Manufacturing Company (1940), 26 N. L. R. B. 74.

In the *General Furniture Manufacturing Company* case, *supra*, it appeared that the President of the United Brotherhood of Carpenters and Joiners of America, A.F.L., caused the charter of the local union with which the employer had a closed shop contract to be suspended, and three days later created a new local union to succeed to the rights of the old. All but five of the employer's 189 employees thereupon shifted membership from the old local to the new. At the request of the new local, three of these five employees were refused reinstatement after a temporary lay-off, and the other two were discharged because they were not members of the new local. The National Labor Relations Board held that, because of the failure of the five to comply with the closed shop conditions, the discharges and refusals to reinstate were lawful.

We respectfully submit that under decisional authority and the law, the discharges of appellants were not unlawful, unless it can be said that veterans, as such, by virtue of the Selective Service and Training Act of 1940, as amended (50 U. S. C. A., Sec. 308), are freed from the obligation, which is imposed on all other employees, to conform to the terms of a collective bargaining contract.

II.

The Discharges of Appellants Were Not "Without Cause" Under the Selective Service and Training Act of 1940, as Amended.

A. A Closed Shop Contract Applies to Returned Veterans Just as It Does to All Other Employees.

The following are the pertinent statutory provisions which guarantee certain rights and privileges to returned veterans:

"(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *

* * * * *

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * *

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances

have so changed as to make it impossible or unreasonable to do so:

* * * * *

“(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration. * * *.” (54 Stat. 885, 890, as amended, 50 U. S. C. A., 308.)

There is no language in the Act to indicate that veterans as such are to be freed from obligation of conforming with the closed shop provisions of a collective bargaining contract between the employer and the union, and the few courts which have passed on the question have uniformly held that the veteran, like all other employees, is subject to the provisions of such a contract.

In *Kemp v. John Chatillon & Sons, Inc.* (3rd Cir. 1948), 169 F. 2d 203 at 207, the Third Circuit Court said:

“Upon consideration of all the circumstances of the instant case and applying the test indicated we are of the opinion that Kemp’s discharge was not ‘without cause’ within the purview of the statute. Chatillon had entered into a binding and legal closed-shop agreement with the Union. The Union insisted that Kemp join its membership or be discharged. If

Chatillon had insisted upon retaining Kemp in employment it would have breached the terms of its contract with the Union. Moreover, it would have run a substantial risk of disrupting its labor relations and it might reasonably have anticipated a strike at its plant."

In *Droste v. Nash Kelvinator Corporation* (E. D. Mich. 1946), 64 Fed. Supp. 716, the Court noted that there is no reason to assume that in the enactment of the Selective Service and Training Act Congress intended to suspend for veterans the provisions of the National Labor Relations Act. The Court said at page 721:

"There is no reason to believe that Congress intended to amend or repeal any part of the National Labor Relations Act when it passed the Selective Training and Service Act. No parts of the former Act are specifically repealed by the latter, and repeals by implication are not favored. *United States v. Borden Co.*, 308 U. S. 188, 60 S. Ct. 182, 84 L. Ed. 181."

In *Bozar v. Central Pennsylvania Quarry, Strip. and Constr. Co.* (M. D. Pa., 1947), 73 Fed. Supp. 803, the Court held that the veteran was properly denied his previous employment because he was not a member of the Union which upon his return had a closed shop contract with the employer. The Court also noted that the veteran was not "qualified," as that word is used in the Act because he lacked union membership. The Court said at page 810:

"There is nothing in the Act which precludes respondent from entering into the coal company contract or from entering into the closed shop agreement with the union. Long before petitioner was engaged by respondent it had been the practice of respondent to accept contracts from coal companies and to agree

to the conditions of the 1939 agreement. There was certainly no intention on the part of Congress to stop such a course of business. To quote Mr. Justice Rutledge under circumstances other than those here present. 'We do not think Congress had in mind such far-reaching consequences for the nation-wide system of employment, both public and private, when making the statutory provisions for the veteran's benefit.' *Trailmobile Co. v. Whirls, supra.*"

* * * * *

"Webster's New International Dictionary, Second Edition, defines 'qualified' as *inter alia*, 'Having complied with the specific requirements of precedent conditions for an office, appointment, employment, etc.' See *Trusted Funds, Inc., v. Dacey*, 1 Cir., 1947, 160 F. 2d 413, at page 420, holding that 'qualified' means more than 'simply physically and mentally qualified.'"

In the pending cause appellants were similarly not qualified, for they lacked union membership, a requirement of employment.

All of the decisions of which we are aware hold that the veteran is subject to the terms of the collective bargaining contract so long as it does not discriminate against him as a veteran and accords him the same privileges that are available to the rest of the employees. This is the plain effect of the Supreme Court's decision in *Aeronautical Lodge v. Campbell* (1949), 337 U. S. 521, 69 S. Ct. 1287.

The Selective Service and Training Act provides only that the veteran shall be restored to his position without loss of seniority, and with the right to participate in insurance and other benefits offered by the employer, and

that he shall not be discharged without cause. No claim is made by appellants that they were denied seniority rights or insurance or other benefits. Their sole complaint is that they, like all other employees, were required to be a member of the union of the employees in order to continue in their employment. In the absence of any language in the Selective Service and Training Act, it cannot be assumed that Congress intended, in so far as veterans are concerned, to suspend the provisions of the National Labor Relations Act which authorized the making of a collective bargaining contract requiring union membership as a condition of employment. If such an assumption could be made, it would be as logical to assume that Congress intended to suspend for veterans such laws as require a license to drive a truck, pilot an airplane, or work as a plumber.

No one would seriously contend that a discharge of a veteran who was a truck driver because he failed to have a driver's license, or of a pilot for failure to have a pilot's license, would be "without cause," yet we cannot see any difference between that situation and the case of appellants who, despite the contractual requirement of union membership, which contractual requirement was authorized by the National Labor Relations Act, nevertheless refused the proffered union membership.

B. A Refusal by the Employer to Discharge Appellants Would Have Been a Breach of the Contract With the Union and Would Probably Have Resulted in a Strike. In These Circumstances the Discharges Were Not Without Cause.

The discharge of appellants upon the demand of the union was a contractual obligation of the respondent. Moreover, the Union's demands were accompanied by a threat of strikes and economic pressure if the demands were not complied with [Tr. 215-216]. It is significant that appellants had it within their power to avert the discharges or the breach of contract or the threatened strike by simply joining the Union as they were requested to do. They elected not to do so, despite knowledge that without such membership the company could not keep them in its employ [Tr. 216]. The employer, on the other hand, had no power to solve the problem. It had no alternative but to discharge appellants. In these circumstances, we submit, the employer had "cause" to discharge appellants.

In *Keserich v. Carnegie-Illinois Steel Corporation* (7th Cir. 1947), 163 F. 2d 889, Judge Minton discussed the meaning of the phrase "without cause," as used in the Selective Service and Training Act of 1940, in the following language (p. 890):

"* * * The cause intended by the statute does not have to be a legal cause. It may be such cause as a fair-minded person may act upon, and where such action is not arbitrarily taken with a purpose or as an excuse to avoid the statute, it is cause within the meaning thereof."

The foregoing language of Justice Minton's was quoted with approval by the Court of Appeals for the Third Circuit in the *Kemp v. John Chatillon & Sons, Inc.*, case (169 F. 2d 203, 207). The Court of Appeals for the Third Circuit noted that Justice Minton's views were entitled to particular weight for when the Selective Service and Training Act was enacted by the Congress, Justice Minton was one of the Senators in charge of the Senate bill, which contained the "without cause" language, and he was also a member of the Conference Committee which resolved the differences in the bills of the Senate and the House of Representatives. The Court of Appeals for the Third Circuit also discussed the meaning of the statutory phrase "without cause" as follows:

"We think that the word 'cause' as used in the statute does not necessarily mean 'legal' cause; that is to say, a cause which would furnish the employee with a cause of action against his employer because of a dismissal or discharge. On the other hand we are of the opinion that the cause may not be a mere excuse or an arbitrary action on the part of the employer to avoid the impact of the statute." (169 F. 2d 203, 206.)

We respectfully submit that under no circumstances could it be said that the employer in the pending cause took action arbitrarily "with a purpose or as an excuse to avoid the statute." On the contrary, the discharges of appellants were reasonable ones under the circumstances, and were not "without cause."

III.

This Action Was Tried and Submitted on the Theory That the Contract as a Collective Bargaining Contract Was Valid. Appellants Are Now Requesting This Court to Review the Case on a Different Theory.

A. Statement of Facts for the Purpose of Considering This Question.

The Petition for Enforcement of Veterans' Reemployment Rights [Tr. 2-9] was filed in the District Court on January 23, 1947. The Answer of Los Angeles Brewing Co. [Tr. 9-41] was filed and served on February 23, 1947. The petition alleged that appellants were discharged because they were not members of the teamsters union. There was no allegation that the closed shop contract pursuant to which appellants were discharged was invalid. The cause came on for trial on April 1 and April 2, 1947, and evidence both oral and documentary was offered by both parties and received by the Court. No evidence was offered to show that the contract as a contract was invalid. Evidence was offered by the respondent company, and it was received [Tr. 291-292, 316], to show that the contract was made with the union which at the time the contract was made represented for purposes of collective bargaining more than 90% of the company's employees. No contrary evidence was offered. No contrary contention was made. On April 2, 1947, the District Judge, Honorable Paul J. McCormick announced from the bench that he was prepared to deny the relief prayed for [Tr. 44].

Thereafter appellants made a motion for a new trial [Tr. 45], requesting leave to add the teamster locals as additional respondents. The grounds urged for the motion were as follows:

“That since the trial of this case and the oral announcement of the Court’s opinion on April 1, 1947, the Supreme Court of the United States, in the case of *Trailmobile Co. v. Whirls*, decided April 14, 1947, held that during a veteran’s statutory year of reemployment his restored rights cannot ‘be altered adversely by the usual processes of collective bargaining,’ thereby confirming petitioners’ claim that their discharges were unlawful, *notwithstanding the agreement entered into in July, 1946*,* between the respondent and the proposed additional respondents named in the motion.”

This motion was granted on May 19, 1947 [Tr. 47]. Thereafter on May 28, 1947, an Amended Petition for Enforcement of Veterans’ Reemployment Rights was filed [Tr. 49-61] and answers thereto were duly filed by the respondents [Tr. 99-122; 123-140]. It is true that the Amended Petition did make the validity of the closed shop contract an issue. The amended petition alleged [Tr. 53] that the July 28, 1946 contract was not a valid closed shop contract; that the National Labor Relations Board had not certified the teamster locals as the collective bargaining agent; and that said Board had not and did not prior to December 1946, determine the appropriate unit for purposes of collective bargaining. The answers alleged [Tr. 114-116; 129-131] that the contract was valid; that a certification by the National Labor Relations

*Emphasis added.

Board is not necessary to impose on the employer the duty to bargain with the representative of a majority of his employees; and that the National Labor Relations Board had found that the unit covered by the July 28, 1946 contract was an appropriate unit for purposes of collective bargaining.

The only evidence offered or received in the case thereafter was on June 5, 1947 [Tr. 64; 362-367]. No evidence was offered to show that the contract was invalid; that the teamster locals were not the duly designated representatives of a majority of the company's employees at the time the contract of July 28, 1946 was made; or that the bargaining unit covered by the contract was not an appropriate unit for purposes of collective bargaining.

The matter was continued from time to time, and on December 23, 1948 the District Judge read his Memorandum of Decision [Tr. 199-207] in which he found that a majority of the company's employees had, prior to the making of the July 28, 1946 contract resigned from the International Union of United Brewery, Flour, Cereal and Soft Drink Workers and had organized and joined the teamster locals, and that the company and the teamster locals duly negotiated the July 28, 1946 contract. The findings of fact and conclusions of law were signed on December 31, 1948.

Further *indicia* that what appellants now label the "main issue" was not heretofore deemed an issue is found in the fact that the Statement of Points on Which Appellants Intend to Rely on Appeal [Tr. 386-387] did not even list this "main issue" as a point at all. Similarly, the Affidavit for Extension of Time to Perfect and Docket Appeal [Tr. 382-385], wherein the nature of the case

is described, indicates clearly that the validity of the contract as a contract was not deemed an issue on appeal.

Appellants have apparently abandoned now the two contentions which they urged in the District Court, namely:

(1) Union membership cannot validly be required of a returned veteran during his statutory reemployment year, and his discharge, for lack of such membership, at the demand of the Union which represents the employees and has a closed shop contract with the employer, is a discharge "without cause" under Section 8(e) of the Selective Service and Training Act of 1940, as amended (50 U. S. C. A. App., Sec. 308(e)) and Section 7 of the Service Extension Act of 1941 (50 U. S. C. A. App., Sec. 357).

(2) In any event this contract did not by its terms require union membership of returned veterans.

The abandonment now of the first ground urged in the District Court is perhaps understandable in view of the decision in *Aeronautical Industrial District Lodge 727 v. Campbell* (1949), 337 U. S. 521, 69 S. Ct. 1287, where the Supreme Court declared that the veteran's rights are subject to the normal collective bargaining contract so long as the contract expresses the honest desires for the protection of the interests of all members of the union and is not a skillful device for hostility to veterans. The Court noted that the Act protects the veteran "from being prejudiced by any change in the terms of a collective agreement because he is 'on furlough,' but he is not to be favored as a furloughed employee as against his fellows" (337 U. S. at 526).

The abandonment now of the second ground urged in the District Court is also understandable in view of the express terms of the contract [Tr. 211].

We respectfully submit that the record discloses the ground now urged as the "main issue" is in effect a request that this Court review the case on a new theory.

B. This Court Will Not Review a Case on Appeal on a Theory Different From That on Which It Was Tried Below.

There are a number of decisions wherein this Court has declared the principle stated above.

United States v. Kettenbach (9th Cir., 1913), 208 Fed. 209, 213.

This case was an action to declare certain land patents fraudulent and void. The statute prohibited purchase of the land for speculation and required that the land be appropriated to the purchasers' exclusive use and benefit. The complaint alleged and the case was tried by the government on the theory that the purchasers had intended the land to inure to the benefit of persons other than themselves. On appeal the government urged the patents be declared fraudulent and void because the evidence established that they were purchased for purposes of speculation. This Court refused to review the case on this new theory of the government's.

In *Ford Motor Co. v. Farrington* (9th Cir., 1917), 245 Fed. 850, this Court declared at pages 852-853:

"The major part of appellant's brief is devoted to the question whether or not its 'agency contract' is obnoxious to the anti-trust laws, and therefore void; but, in view of the fact that the cause was tried and

submitted upon the theory that the contract was valid, and that the rights of the parties were defined and were to be measured thereby, the inquiry is thought to be immaterial.”

In *Brown v. Gierney* (1906), 201 U. S. 184, 190, 26 S. Ct. 509, the Supreme Court declared that a fact assumed as true in the trial court could not be contested in the appellate court. Similarly, this Court declared in *Wilson v. Byron Jackson Co.* (9th Cir. 1938), 93 F. 2d 572, 573, that a fact conceded throughout the trial could not be disputed on appeal.

We respectfully suggest that the principle declared in these cases should be applied to the pending cause where, although the amended petition did technically raise the issue, nevertheless no evidence was offered by appellants with respect thereto: the issue was not made one of the points on which appellants declared they intended to rely on appeal, and it is a different theory upon which this Court is now requested to review the case.

Conclusion.

Although appellants have attempted, on appeal, to convert their action from one under the Selective Service and Training Act of 1940 to an unfair labor practice proceeding, which is an issue and a theory not properly before this Court, nevertheless, we respectfully submit, it is clear from the record that the contract was made with a union representing a majority of the employees of the company; it was a valid contract; and appellants were lawfully discharged for failing and refusing to become members of the contracting union as required by the contract as a condition of employment.

A discharge of a returned veteran for refusal to join the union is not a discharge without cause where such action is taken pursuant to the demand of the union which has a valid closed shop contract with the employer and has threatened strikes and economic pressure if the contract should not be enforced. Appellants, who could have avoided their discharges simply by joining the contracting union, and who were treated in the same manner as all other employees, were not discharged "without cause."

For these reasons, we respectfully submit that the judgment appealed from should be affirmed.

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No. 12,247

IN THE
United States Court of Appeals
For the Ninth Circuit

FRED ELIA IOB, SAMUEL M. DOBBS,
and WALDEMAR F. ULLRICH,

Petitioners and Appellants,

VS.

LOS ANGELES BREWING Co., INC. (a
corporation), et al.,

Respondents and Appellees.

ANSWERING BRIEF OF
ADDITIONAL RESPONDENTS AND APPELLEES.

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PAUL P. O'BRIEN,

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**ANSWERING BRIEF OF
ADDITIONAL RESPONDENTS AND APPELLEES.**

STATEMENT OF FACTS.

Insofar as the additional respondents are concerned, there never has been a trial. Insofar as the additional respondents are concerned, this cause was dismissed without ever going to trial.

During the month of January, 1947, an action was instituted by appellants against the Los Angeles Brewing Company, Inc. (Tr. 2-9.) In the month of February, 1947, the said brewing company filed its answer. (Tr. 9-41.)

On April 1, 1947, the said cause came on for trial and was tried on April 1 and 2, 1947. The Court made its decision and directed the preparation of findings. (Tr. 42-44.) Nine (9) witnesses testified at said trial and a stipulation was entered into with respect to the testimony of another witness. (Tr. 42-44.)

On May 19, 1947, petitioners, the appellants here, moved for a new trial and for leave to amend their petition and add additional respondents as parties. The motion was granted. (Tr. 45-47.)

Up to this point additional respondents had not been parties and had taken no part in any of the proceedings.

On or about May 28, 1947, an amended petition was filed and an order to show cause was issued. (Tr. 48-63.)

On June 5, 1947, the return day of said order to show cause, additional respondents appeared specially and moved to dismiss, vacate and set aside alias summons, amended petition for enforcement of veterans' employment rights, order to show cause and supported said motion with an affidavit and memorandum of points and authorities (Tr. 66-73) and oral testimony. (Tr. 359-367.)

On June 7, 1947, the said motions were denied. (Tr. 98.)

On June 10, 1947, additional respondents served and filed their answer (Tr. 99-123) to petitioners' amended petition. (Tr. 48, et seq.)

That thereafter, all further proceedings were, on September 3, 1947, suspended until November 4, 1947. (Tr. 170.)

That on December 8, 1948, said cause came on "*For resetting for trial or disposition*". (Tr. 198; italics ours.)

That said cause as to said additional respondents has never been set for trial and, insofar as the additional respondents are concerned, never tried.

STATEMENT OF THE CASE.

Appellants state:

"Error No. 1

The District Court erred in ruling that the appellants' discharges were for cause within the meaning of Section 8 of the Selective Service and Training Act.

Error No. 2.

The District Court erred in failing to order re-employment of appellants by Los Angeles Brewing Company and in failing to assess damages against respondents for loss of wages of appellants."

(App. Br. pp. 8-9.)

and argue:

"Thus the acts of the Teamsters' Unions in wrongfully bringing about the discharge of the appellants in this case, are tortious and the appel-

lants are entitled to a judgment for damages against these unions.”

(App. Br. p. 14.)

Appellants forget that as to the so-called “Teamsters’ Unions”, there has been no trial and they have not had their day in Court.

For this Court or any Court, on the record as it now stands, to render a judgment against the additional respondents would be unconstitutional, void and a truly monstrous violation of due process.

Certainly, the attempt by appellants to bind the additional respondents by the testimony of nine (9) witnesses (Tr. 42-44 and 240-359) all heard before additional respondents were made parties, and none of whom additional respondents had an opportunity to cross-examine, must fail.

Certainly, these additional respondents cannot be bound by a stipulation as to the testimony of one, Dobbs, made by the attorneys of petitioner and respondent at a time when additional respondents were not even parties. (Tr. 42-43.)

In view of the Court’s announced intention so to bind additional respondents and in view of the Court’s refusal to permit additional respondents to cross-examine said witnesses (Tr. 368-375) additional respondents included in their answer the following:

“Third Defense.

“The joinder of the additional respondents at this stage of the proceedings and upon the terms

laid down by the Court as to each said additional respondent is a denial of due process and a violation of the Fifth Amendment to the Constitution of the United States.”

(Tr. 100.)

That whatever action the District Court decided to take in the above entitled matter, insofar as additional respondents are concerned, could only have been based upon the hearing on the order to show cause issued May 28, 1947 (Tr. 61-63) and heard June 5, 1947 (Tr. 63-65) and June 7, 1947 (Tr. 96-98) at which time the Court granted additional respondents leave to file:

“* * * answering affidavits in support of respondent unions re Order to Show Cause, at which time the Court will issue injunction in accordance with its finding that the petitioners were unlawfully discharged and are entitled to their positions (unless said affidavits remove conclusion which Court has arrived at) upon application therefor by petitioners.”

(Tr. 98.)

That additional respondents complied and on June 10, 1947, served and filed its verified answer. (Tr. 99-123.) Apparently, the additional affidavits and the answer of additional respondents removed the conclusions which the Court had arrived at and substituted others, resulting in the dismissal.

ARGUMENT.

The Fifth Amendment to the Constitution of the United States says:

“* * * no person shall * * * be deprived of life, liberty or property without due process of law.”

“In its procedural aspect the constitutional guaranty of due process of law assures to every person his day in court.”

16 *C. J. S.*, p. 1153;

Truax v. Corrigan, 42 S. Ct. 124, 257 U.S. 312,
66 L. Ed. 254.

“Its essential elements are notice and opportunity to be heard or defend.”

16 *C. J. S.*, pp. 1153-1154;

Ownbey v. Morgan, 41 S. Ct. 433, 256 U. S. 94,
65 L. Ed. 837;

Postal Telegraph Cable Co. v. City of Newport,
38 S. Ct. 566, 247 U. S. 464, 62 L. Ed. 1215.

“The right to a fair and adequate hearing in which one has the right to defend his interests before an impartial court is essential to due process of law.”

16 *C. J. S.*, p. 1265.

“* * * Due process has been held to include the right to counsel. * * *”

16 *C. J. S.*, p. 1267.

“A party has a right to cross-examine witnesses who have testified for the adverse party, and this right is absolute and not a mere privilege, and, unless subject to cross-examination, a witness cannot testify, and it is not within the discretion of

the court to say whether or not the right will be accorded; further, it has been held that this right is embraced in the constitutional right to counsel for defense.”

70 *C. J.*, pp. 611-612;

Alford v. U. S., 51 S. Ct. 218, 282 U. S. 687,

75 L. Ed. 624.

It follows, we submit, from the foregoing that at no time could the trial Court have entered any judgment against the additional respondents for damages, nor could the trial Court have granted a permanent injunction against additional respondents.

At most, the trial Court might have granted an injunction *pendente lite* against the additional respondents from which respondents would have appealed by reason of the Court's violation of due process in that in considering petitioner's application for an injunction *pendente lite*, the trial Court announced that it would:

(a) consider all the testimony previously offered, and

(b) would not direct or order the recall of said witnesses for cross-examination (Tr. 368-375)

to all of which additional respondents objected.

However, the trial Court did not issue any injunction *pendente lite*, but instead upon application of the appellants' counsel for "final action" dismissed the proceeding.

CONCLUSION.

Additional respondents respectfully submit that as to them no judgment may be entered against them by this Court or by the District Court in the absence of a trial.

However, additional respondents respectfully submit that the decision of the District Court was not erroneous and that the facts, issues and the law applicable thereto have been erroneously stated in the opening brief of appellants and therefore respectfully ask leave of the Court for thirty (30) days from and after the filing of respondents' answering brief within which to file an amicus curiae brief in support of respondents with respect to the alleged Errors Nos. 1 and 2 set out in appellant's brief.

Dated, San Francisco, California,
January 25, 1950.

Respectfully submitted,

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